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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 165.

IRA W. COLLINS, PLAINTIFF IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

FILED NOVEMBER 29, 1909.

(21,914.)

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Caption.

THE STATE OF TEXAS:

At terms of the Honorable Court of Criminal Appeals of Texas, begun and holden within and for the State of Texas, beginning and ending as follows, to-wit: Austin Term, beginning on the 5th day of April, A. D. 1909, and ending on the 23rd day of June, A. D. 1909; and beginning on the 4th day of October, A. D. 1909, and which is still in session—present, Honorable W. L. Davidson, presiding Judge, and Judges M. M. Brooks and W. F. Ramsey—the following proceedings were had in cause No. 60/4029, Ex parte Ira W. Collins.

Transcript from County Court of El Paso County.

Caption.

THE STATE OF TEXAS,
County of El Paso:

At a term of the County Court, begun and holden within and for the County of El Paso, Texas, at the court-house thereof, in the city of El Paso (the Honorable Albert S. Eylar, Judge thereof, presiding) on the first day of March, A. D. 1909, which adjourned and ended on the 24th day of April, A. D. 1909, the following cause came on for trial, to-wit: No. 3678, Ex parte Ira W. Collins.

Application for Writ of Habeas Corpus.

STATE OF TEXAS,
County of El Paso:

To the Honorable County Judge of the county of El Paso, Texas:

2 Now comes Ira W. Collins and respectfully states under oath, that he is illegally restrained in his liberty by F. J. Hall, Sheriff of El Paso County, Texas; that he is so restrained under color of a certain capias or warrant of arrest, a copy of which is annexed to this petition and marked "Exhibit A"; your petitioner respectfully prays that the writ of habeas corpus may issue in his favor, directed as the law requires, commanding said F. J. Hall, sheriff as aforesaid, to produce your petitioner at a time and place to be designated by your honor, to be named in the writ, and show why he is held in custody or under restraint.

IRA W. COLLINS.

PATTERSON, BUCKLER & WOODSON,
Attorneys for Petitioner.

STATE OF TEXAS,
County of El Paso:

Before me, the undersigned authority, on this day personally appeared Ira W. Collins, and after being by me duly sworn he states under oath that the allegations of the foregoing petition are true according to his belief.

IRA W. COLLINS.

Subscribed and sworn to before me this 5th day of March, 1909.
[SEAL.]
J. E. CAWTHON,
Notary Public, El Paso Co., Texas.

EXHIBIT "A."

Capias.

The State of Texas to any Sheriff of the State of Texas, Greeting:
You are hereby commanded to arrest Ira W. Collins and him safely keep, so that you have him before the Honorable County Court of El Paso County, in said State at the Court-House of said County, in the city of El Paso, Texas, on the 5th day of March, A. D. 1909, then and there to answer the State of Texas upon an information pending in said Court, charging him with the offense of unlawfully practicing medicine.

Herein fail not, but due return make hereof to this Court
3 Witness my signature and official seal on this the 5th day of March, A. D. 1909.

[SEAL.]
PARK W. PITMAN,
Clerk of the County Court of El Paso County, Texas.
By C. ARANDA, *Deputy.*

Endorsement: File No. 3678. The State of Texas vs. Ira W. Collins. Capias. Issued the 5th day of March, 1909. Park W. Pitman, Clerk of the County Court, El Paso County, Texas. By C. Aranda, Deputy.

Order of Court Granting Writ of Habeas Corpus.

I certify that the foregoing application was presented to me on the 5th day of March, 1909; and it is ordered that the writ of habeas corpus, as herein prayed for, be issued by the Clerk of the County Court of El Paso County, Texas, returnable before the County Court of El Paso County, Texas, now in session at the County Court room in the city of El Paso, Texas, on the 6th day of March, 1909, at 10 o'clock A. M. It is ordered that this application, with its exhibit, be filed with the Clerk of the County Court, El Paso County, Texas.

Witness my official signature, this 5th day of March, 1909.

ALBERT S. EYLAR,
Judge County Court, El Paso County, Texas.

Endorsement: No. 3687. In Co. Ct. El Paso Co., Texas. Ex parte Ira W. Collins. Application for writ of habeas corpus. Filed this 5 day of March, A. D. 1909. Park W. Pitman, County Clerk. By E. Fowler, Deputy.

4 *Writ of Habeas Corpus.*

STATE OF TEXAS,
County of El Paso:

To F. J. Hall, Sheriff of the County of El Paso, Greeting:

You are hereby commanded, that the body of Ira W. Collins, in the jail of the said county of El Paso, under your custody together with the day and cause of his being imprisoned and detained by whatsoever name the said Ira W. Collins may be known, you have him before the Hon. Albert S. Eyler, County Judge of said El Paso County, at El Paso, Texas, in said County, at 10 o'clock A. M. on the 6th day of March, 1909, to do and receive what shall then and there be considered concerning the said Ira W. Collins, so imprisoned as aforesaid.

Herein fail not, but of this Writ make due return as the law directs.

In testimony whereof, witness my signature and seal this 5th day of March, A. D. 1909.

[SEAL.] PARK W. PITMAN,
Clerk County Court, El Paso County, Texas.
By EDWIN FOWLER, *Deputy.*

Sheriff's Return.

STATE OF TEXAS,
County of El Paso:

I, F. J. Hall, Sheriff of El Paso County, Texas, in obedience to the within writ of habeas corpus, have herewith the body of the above named, Ira W. Collins, before the said A. S. Eylar, County Judge; and for return on said writ I state that said Ira W. Collins is in my custody as sheriff of said County by virtue of a certain capias or warrant of arrest issued by Park W. Pitman, Clerk of the County Court of El Paso County, Texas, on the 5th day of March, 1909, by which I was commanded to take the body of the said Ira W. Collins and him safely keep and have him before the said County Court to answer the State of Texas, on an information based on a complaint charging said Ira W. Collins with unlawfully
5 practicing medicine in El Paso County, Texas, preferred against him by the County Attorney of El Paso County, Texas, upon the complaint of E. W. Earl, a copy of which said capias or warrant of arrest and complaint and information are annexed hereto; and numbered Exhibits "A", "B", & "C", that said case, based upon said complaint and information against Ira W.

Collins, has never been tried, but is now pending in the County Court of El Paso County, Texas.

F. J. HALL,
Sheriff El Paso County, Tex.

Subscribed and sworn to before me this 10 day of March, 1909.
[SEAL.] PARK W. PITMAN,
Clerk Co. Ct. El Paso Co., Tex.
By C. ARANDA, *Deputy.*

"EXHIBIT A.

Complaint."

In the Name and by the authority of the State of Texas: I, E. W. Earle, do solemnly swear that in the County of El Paso and State of Texas, on or about the 2nd day of September, 1908, Ira W. Collins, who was then and there a resident of said County of El Paso and State of Texas, did then and there practice medicine upon human beings within the limits of the State of Texas, and County of El Paso, without authority of law, to-wit: did then and there in the manner hereinbefore and hereinafter stated, unlawfully treat a physical disease and disorder, to-wit: Did then and there unlawfully treat, Julia Ballinger, a human being, for hay fever, said hay fever being a physical disease and disorder, and did charge the said Julia Ballinger therefor, directly, money the value and amount of which is to affiant unknown, said treatment being given in the capacity of a physician and doctor, under the system and branch of medicine called Osteopathy, by means of a system of doctoring and physical treatment called 'Osteopathy', which treatment consists and did then and there consist in manipulating scientifically, the limbs,
muscles, ligaments and bones of the human body and of the
6 said Julia Ballinger, which pressed upon the nerves of the
blood supply so that nature might have free action, the natural blood supply be restored, and the diseased condition thus removed, so unlawfully treating in the County of El Paso and State of Texas, in which the said Ira W. Collins then and there resided, all of which said treatment was given in violation of the provisions of Chapter 123, Acts of the 30th Legislature of the State of Texas, without having first registered in the Districts Clerk's Office of El Paso County, Texas, the county in which he, the said Ira W. Collins, then and there resided, his authority from the Board of Medical Examiners for the State of Texas for so practicing, together with his age, post-office address, place of birth, school of practice to which he then and there professed to belong, subscribed and verified by oath, as prescribed and required by the provisions of Chapter 123 of the General Laws of the State of Texas, Acts of the 30th Legislature of Texas, page 224 et seq., and against the peace and dignity of the State.

E. W. EARL, *Affiant.*

Subscribed and sworn to before me, this 27th day of November, 1908.

W. W. BRIDGERS,
County Attorney in and for El Paso County, Texas.

Filed this 27 day of Feb. A. D. 1909.

PARK W. PITMAN,
County Clerk.
By E. FOWLER, *Deputy.*

"EXHIBIT B.

Information."

In the Name and by the Authority of the State of Texas: W. W. Bridgers, County Attorney of the County of El Paso, State of Texas, presents to the County Court in and for said County, at its January Term, A. D. 1909, that on or about the 2d day of September, A. D. 1908, and before the filing of this information, in said County of El Paso, State of Texas, Ira W. Collins, who was then and there a resident of said County of El Paso and State of Texas, did
7 then and there practice medicine upon human beings within the limits of the State of Texas, and County of El Paso, without authority of law, to-wit: Did then and there in the manner hereinbefore and hereinafter stated, unlawfully treat a physicial disease and disorder, to-wit: Did then and there unlawfully treat Julia Ballinger, a human being, for hay fever, said hay fever being a physical disease and disorder, and did charge the said Julia Ballinger therefor, directly, money the value and amount of which is to the County Attorney unknown, said treatment being given in the capacity of a physician, and doctor, under the system and branch of medicine called Osteopathy, by means of a system of doctoring and physical treatment called "Osteopathy," which treatment consists and did then and there consist in manipulating scientifically the limbs, muscles, ligaments and bones of the human body and of the said Julia Ballinger, which pressed upon the nerves of the blood supply so that nature might have free action, the natural blood supply be restored, and the diseased condition thus removed, so unlawfully treating in the County of El Paso, State of Texas, in which the said Ira W. Collins then and there resided, all of which said treatment was given in violation of the provisions of chapter CXXIII, Acts of the 30th Legislature of the State of Texas, without having first registered in the District Clerk's Office of El Paso County, Texas, the County in which he, the said Ira W. Collins, then and there resided, his authority from the Board of Medical Examiners for the State of Texas for so practicing, together with his age, post-office address, place of birth, school of practice to which he then and there professed to belong, subscribed and verified by oath, as prescribed and required by the provisions of Chapter CXXIII of the General Laws of the State of Texas, Acts of the 30th Legislature

of Texas, page 224 et seq., and against the peace and dignity of the State.

W. W. BRIDGERS,
County Attorney in and for El Paso County, Texas.

8 Endorsed: The State of Texas vs. Ira W. Collins. Offense, unlawfully practicing medicine. Information. Filed on the 27 day of February, A. D. 1909. Park W. Pitman, County Clerk; by C. Aranda, Dept'y. Witness, Julia Ballinger.

"EXHIBIT C.

Warrant for Arrest."

State of Texas to any Sheriff of the State of Texas, Greeting:

You are hereby commanded to arrest Ira W. Collins, and him safely keep, so that you have before the Honorable County Court of El Paso County, in said State, at the Courthouse of said County, in the City of El Paso, Texas, on the 5th day of March, A. D. 1909, then and there to answer the State of Texas upon an information pending in said court, charging him with the offense of unlawfully practicing medicine.

Herein Fail Not, but due return make hereof to this Court.

Witness my signature and official seal on this 5th day of March, A. D. 1909.

[SEAL.] PARK W. PITMAN,
Clerk County Court, El Paso Co., Texas.
By C. ARANDA, *Deputy.*

Endorsement: No. 3687. Ex Parte Ira W. Collins. Writ of Habeas Corpus and Exhibits and Sheriff's Return. Returned and filed March 10, 1909. Park W. Pitman, Clerk; By Edwin Fowler, Deputy.

Judgment.

No. 3687.

Ex Parte IRA W. COLLINS.

On Application for Writ of Habeas Corpus.

On this the 27th day of March, 1909, came on to be heard the petition of Ira W. Collins for writ of habeas corpus. And the Court having read the petition and the return of the sheriff of El
9 Paso County, Texas, on the writ of habeas corpus heretofore issued herein, together with all exhibits thereto attached, and having heard the evidence introduced by the petitioner, as well as that introduced by the State, and having heard the argument of counsel, and having duly considered the application of the petitioner and the evidence introduced, and the argument of counsel, and the

law applicable to the case, is of the opinion that the applicant is not unlawfully deprived of his liberty as claimed by him in his petition, and that the writ should be denied.

Wherefore it is ordered and adjudged by the Court that the applicant, Ira W. Collins, be remanded to the custody of the Sheriff of El Paso County, Texas, to be by him held in custody, until discharged according to law.

To the foregoing judgment, the applicant, Ira W. Collins, objects and excepts, and in open court gives notice of appeal to the Court of Criminal Appeals for the State of Texas.

And upon motion the said applicant is granted ten days' time after the adjournment of this term of Court in which to file his bills of exceptions and statement of facts.

Statement of Facts.

In the County Court of El Paso County, Texas.

Ex Parte Ira W. Collins.

Be it remembered that upon the trial of the above styled and numbered cause, in the County Court of El Paso County, Texas, at the regular March Term, 1909, Hon. A. S. Eylar, County Judge Presiding, the following evidence was introduced:

The following facts were admitted by counsel for both parties in open Court:

That Ira W. Collins is a citizen of the United States by birth and is a citizen of the State of Texas, and has been a resident of El Paso County, Texas, and a citizen of the city of El Paso, Texas, for about six years, practicing in said city of El Paso during all of said time as a doctor of Osteopathy; that prior to his coming to the city of El Paso, in the year 1903, he graduated as a doctor of Osteopathy, after a full two years' course of instruction at the American School of Osteopathy at Kirksville, Missouri, and received in the Spring of 1903, a diploma which he now has, and ever since has had, from said American School of Osteopathy; that he, relator, and the other graduates of said school do not use and have never used in their practice in the treatment of disease or sickness, any drug or medicine, but their treatment consists and at all times has consisted in manipulating scientifically, as taught in said school of Osteopathy the limbs, muscles, ligaments and bones pressing on the blood supply, so that nature may have free action and the natural blood supply be restored and the diseased condition thus removed.

It is further admitted that said American School of Osteopathy was chartered in the State of Missouri in 1892, and 1894, by a regular charter, under which the said school has since been operating.

It is further agreed that said American School of Osteopathy does not teach and has never taught therepeutics or materia medica, its theory being that a large number of ailments are due to ir-

regular nerve action, and that by stimulating or repressing the nerve centers by manipulation, nature herself is enabled to right the evil; it administers no drugs.

Said school of osteopathy does not teach and has never taught either the properties, nature or effects of drugs or medicines, or how to compound or administer them, or for what maladies they are to be used; but said school teaches and always has taught its students and its graduates to discard the use of drugs and medicines.

It is further admitted that there are now eight well equipped colleges of Osteopathy in the United States, besides the original school at Kirksville; and that more than 5000 doctors of Osteopathy are now practicing in the United States and foreign countries;
11 and osteopathy as a means of healing some human ailments has been recognized by the Legislatures of the majority of the States of the Union; and there was in the month of April 1907, and at the time Chapter 123 of the Acts of 1907, 30th Legislature of Texas, regular session, was passed, and at the time same was designated to go into effect, several hundred practitioners of Osteopathy in the State of Texas.

It is further admitted that at the time said Chapter 123 of the Laws of the 30th Legislature, regular session, was passed, in April 1907, the relator, Ira W. Collins, had already established himself in the City of El Paso, Texas, as a practitioner of Osteopathy, and had expended the sum of $5,000.00, in improving and fitting up his place of business with conveniences etc. suitable for his business in said City, which place of business fitted up at said expense he now occupies and has ever since occupied; and that ever since 1903 he has followed and now follows said profession of Osteopathy for a living; and that his annual income and practice as an Osteopath, at the time said law was passed, in the year 1907, was and ever since has been and now is of the gross annual value of more than $10,000., and the net value of at least $5,000.00.

It is further admitted that said Ira W. Collins, on or about the 2d day of September, 1908, being then and there a resident of the County of El Paso, Texas, did then and there treat Julia Ballinger, a human being, in said County of El Paso, Texas, for hay fever, said hay fever being a physical disease and disorder; and did charge said Julia Ballinger therefor money, said treatment being given by the said Ira W. Collins by means of said system of Osteopathy, and said treatment then and there consisting in manipulating scientifically the limbs, muscles, ligaments and bones and nerves of the said Julia Ballinger, which pressed upon the *nevers* of the blood supply, so that nature might have free action; and that in the treatment of said Julia Ballinger, the said Ira W. Collins used no medicine or drugs whatsoever; and it is admitted that at the time he so treated said Julia Ballinger, he, Ira W. Collins, had not registered in
12 the District Clerk's office of El Paso County, Texas, the county in which he, the said Ira W. Collins, then and there resided, any authority from the Board of Medical Examiners for the State of Texas, for so practicing Osteopathy, and had not registered any Certificate or authority from said Board of Medical Examiners for

so practicing, together with his age, post-office address, place of birth, or the school of Osteopathy to which he then and there professed to belong.

Dr. CHAS. T. RACE, being introduced by the plaintiff, Ira W. Collins, and being sworn, testified as follows: My name is Chas. T. Race, and I am a physician and surgeon and a graduate of Tulane Medical University of Louisiana. I graduated as a physician and surgeon about 30 years ago, and have been practicing medicine and surgery ever since. The college from which I graduated is now known as the Medical Department of the University of Louisiana. I have lived in and practiced medicine in the City of El Paso for more than 20 years. I am an M.D., which means Doctor of Medicine. I belong to the alopathic School of Medicine. I know what the scientific branches of medicine are. They are anatomy, physiology, chemistry, therapeutics, materia medica, practice of medicine, surgery, hygeine, obstetrics, and diseases of women and children. These branches or studies lie at the very foundation of the practice of medicine. I could not conceive of the scientific branches of medicine as not including therapeutics, materia medica and the practice of medicine. I am acquainted with and know what is a reputable medical school. The basic studies that are taught in all reputable medical schools are the basic branches I have mentioned, to-wit: anatomy, physiology, chemistry, therapeutics, materia medica, the practice of medicine, surgery, hygiene, obstetrics, and diseases of women and children. All medical schools teach these branches. I could not conceive of a reputable medical school that did not teach the branches I have mentioned, anatomy, physiology, therapeutics, materia medica, and the practice of medicine. I do not con-
13 sider the practice of osteopathy as being the practice of medicine. There is a difference between a remedy and the practice of medicine. A remedy may consist in a man's walking around the block.

Cross-examined:

I belong to the al-opathic school of medicine. I am giving a list of subjects taught in al-opathic schools, and am testifying as an al-opath. I am not acquainted with the subjects taught in other schools of medicine. I am not acquainted with the subjects taught in schools of osteopathy. Al-opathy means the use of any means calculated to cure or relieve.

Miss LESLYE HYDE, a witness for the State, being first duly sworn, testified, as follows: My name is Lesly Hyde. I am an Osteopathic Physician. I am a graduate of the American School of Osteopathy at Kirksville, Missouri. I entered the institution in February, 1901, and completed the course in January, 1903. I completed the full course of instruction as given in the Institution at that time, and hold a regular diploma from the Institution. I am familiar with the branches taught and studied, the course of study of that school, from 1901 to 1903. I am acquainted with Dr. Collins. I was in

school there at the same time Dr. Collins was. The following subjects constituted the course of study at the American School of Osteopathy, at the time I was a student there: anatomy, physiology, chemistry, pathology, bacteriology, symptomotology, osteopathic therapeutics, histology, obstetrics, gynecology, surgery, neurology, diagnosis. That is all I can think of right now. We used symptomology for the diagnosis of cases. Osteopathic diagnosis includes physical diagnosis. Instruction was also given in the laws of health, hygiene, and also in medical jurisprudence. The subjects that I have indicated as being taught there formed the course of study in which I was instructed. These subjects constituted the regular course of instruction in that school at that time. All of the subjects I have mentioned were necessary in the school at that time in order
14 to obtain a regular diploma.

Cross-examination:

Therapeutics means those remedies used in curing diseases, anything used in curing a disease. Therapeutics is a branch of medical science for treating diseases. Yes, sir, medical science. In so far as it is a branch of medical science I am not an M. D. I am not a Doctor of Medicine. I don't claim to be. No Osteopathist is a doctor of medicine, not of drug therapeutics, no. I am not a doctor of medicine, not of drugs. I am not a regular M. D., no sir. M. D. means a Doctor who uses drugs and prescribes them. Then I am not an M. D. M. D. is the Latin for a doctor of medicine. Osteopathic therapeutics is manipulative and mechanical therapeutics. That is what I mean, and that is what I studied as a part of the course of study at Kirksville. Histology treats of the minute anatomy, microscopic anatomy. That is as full a definition as I can give. It is microscopic anatomy, studied under the microscope. Osteopathic diagnosis is arrived at this way: we use physical diagnosis. We use osculation and palpitation, that is the feeling with the hands, to determine any abnormality. We use the ear, and the touch, and inspection. I would tell the difference between measles and scarlet fever by the history of the case, the appearance of the rash and the general symptoms as they develop. Yes, sir; we can tell before several days after the disease has started, we tell by symptoms, the appearance of the case and the rash, and the history. Yes, before it starts, before there is any rash, whether the patient had been thrown in contact with the disease, and how they had been feeling for several days past.

H. F. Wright, a witness for the State, being first duly sworn, testified as follows: My name is H. F. Wright. I live in El Paso. I belong to the medical profession. I have been in that profession four or five years, about four years. I received my training first in the Still College of Osteopathy in Des Moines. I graduated
15 from that school, in the year 1905. I took the regular course, according to the curriculum of that school. I received a diploma from that school. That school is an osteopathic institution, recognized by the American Osteopathic Association and by the various states that grant certificates to those who are gradu-

ates from such an institution. When I last investigated there were eight of such recognized schools. That eight includes the American School of Osteopathy at Kirksville, Missouri. I received the degree of Doctor of Osteopathy, from that school. My other training was in the National Medical University at Chicago and St. John's Medical University. I received the degrees of M. D. from those schools. M. D. means Doctor of Medicine, that is the Engli-h. I have a license to practice medicine in Texas.

The scientific branches of medicine, those fundamental to the practice of any system of therapy, are anatomy, physiology, histology, bacteriology, chemistry, obstetrics, gynecology, hygiene, medical jurisprudence, surgery, pathology, and physical diagnosis. When I say that these are fundamental branches of medicine, I mean that one cannot scientifically practice therapy without having a knowledge of those sciences. Therapy is the scientific use of any system or means for the alleviating or the curing of di-eases. In answer to the question "how many and what are the different systems of medicine," there is the regular system, sometimes called the al-opathic; homeopathic; osteopathic and e-lectic. Of the subjects I named awhile ago as fundamental to the different branches of medicine, at least twelve are common to the different branches that I mention. The twelve that I named are common to the different branches of medicine. They are common to the home-paths, osteopaths and al-opaths. By materia medica is meant or understood, the scientific arrangement of facts concerning the use of drugs as therapeutic agents. There are at least two kinds of materia medica, regular and homeopathic. The regular is that system of drug therapy taught and practiced by the regular physicians, the al-opathis, in other words. The other kind, the homeopathic system of materia medica is
16 that system of drug therapy taught in the homeopathic institutions and practiced by homeopathic physicians.

Stipulation.

It was thereupon admitted by both parties, and agreed to as a part of the evidence herein, that the Board of Medical Examiners, in passing upon the qualifications of an applicant for a license to practice, does not examine the applicant in therapeutics or materia medica.

We agree and certify that the foregoing is a full, true and correct statement of all of the facts, and all the evidence, introduced upon the trial of the case herein at first styled and numbered, to-wit: No. 3687, In the County Court of El Paso County, Texas, Ex parte Ira W. Collins (Habeas Corpus).

PATTERSON, BUCKLER & WOODSON,
Attorneys for Petitioner.

W. W. BRIDGERS,
County Attorney.

EARL & ELFERS,
Special Counsel for the State of Texas.

Examined and approved on this the 14th day of April, 1909.

ALBERT S. EYLAR,
County Judge of El Paso County, Texas.

Endorsement: No. 3687. Ex parte Ira W. Collins. Statement of Facts. Filed this 14th day of April, A. D. 1909. Park W. Pitman, County Clerk. By C. Aranda, Deputy.

17 *Relator's Bill of Exceptions.*

In Co. Ct. El Paso Co., Tex.

No. 3687.

Ex Parte Ira W. Collins.

Habeas Corpus.

Be it remembered, that upon the trial and hearing of the above styled cause, after the evidence was all introduced, the relator asked to be discharged upon the following grounds:

1st. Relator urges and contends that the words "any system or method" in Subdivision 2 of Section 13 of Chapter 123 of the Acts of 1907, 30th Legislature of Texas, should be construed as referring to any system or method of medicine or surgery, that is any system or method in which drugs are used and should not be construed as applying to a system or method in which medicine or surgery are not used. But if said Subdivision 2 of Section 13 should be construed so as to apply to the relator, not using medicine or surgery, then the relator claims and insists that said Act, to-wit: Chapter 123 of the Acts of the 30th Legislature, approved April 17, 1907, violates the Constitution of the State of Texas and Constitution of the United States, and is void in so far as he is concerned for the following reasons:

2nd. Said Chapter 123 declares in its title that its purpose was "to define and regulate the practice of medicine and to create a Board of Medical Examiners for the examination and licensing of physicians and surgeons and to prescribe their qualifications," etc.; and it is nowhere expressed in the title of said Act that it was the purpose of the Legislature to declare that the treatment of any disease or disorder by any system or method, for compensation or pay, should be regarded as the practice of medicine. And it is nowhere expressed in said title that it was the purpose of the Act to require any person treating any disease, disorder or injury, by any method other than the practice of medicine to obtain a license to practice medicine.

18 3d. The declaration that the treatment of any disease or disorder by any method in which drugs, medicines or surgery, are not used, is the practice of medicine, is false, arbitrary, unreasonable and oppressive, and without the power of the Legislature: the framers of the Constitution, in referring to the qualifications of practitioners of medicine, having evidently had in mind the practitioners of that art of healing requiring and involving the use of medicine and drugs, and requiring and involving a knowledge of materia medica, therapeutics and the practice of medicine.

4th. As to the complaint and information upon which relator is being prosecuted and upon which he is held, simply charge substantially that relator treated Julia Ballinger for hay fever, for pay, by kneading and rubbing, the relator should be discharged, as the Legislature would have no authority to enact a law making such an act a crime or misdemeanor, or to declare that such an act could only be performed by one having a license to practice medicine, or to enact a law making the criminality of such an act depend upon whether or not the operator received pay for his services; or to enact such a law confining the treatment of all disorders, of whatsoever nature and however insignificant, to those who have licenses to practice medicine.

5th. Relator, having established himself in the practice of Osteopathy prior to the passage of said Act of 1907, to-wit: said Chapter 123, and being engaged in the business of his said profession at said time under a diploma from the American School of Osteopathy at Kirksville, Missouri; and his business or profession before that time having been recognized by the Legislature of Texas as not being the practice of medicine, the application of said Chapter 123 to him, and to require him under said Chapter 123 to obtain either the verification license mentioned in said Section 6 of said Act, or to require him to obtain a license to practice medicine as pro-
19 vided in Sections 7 and 9 of said Act, would be directly in violation of Section 19 of the Bill of Rights (Constitution of Texas) which declares that no citizen shall be deprived of property, privileges or immunities, except by due course of the law of the land, and would be directly in violation of the 14th Amendment to the Constitution of the United States, which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

6th. If relator, practicing Osteopathy as shown by the evidence, was practicing medicine at the time said Chapter 123 went into effect, on account of the fact that he treated some diseases by the principles of Osteopathy, and Osteopathy was at the time said Chapter 123 went into effect, a school of medicine and is now a school of medicine, then said Chapter 123 is directly in violation of Section 31 of Article 16 of the Constitution of Texas, which provides that in prescribing the qualification of practitioners of medicine, the Legislature shall not give preference to any school of medicine; and to require plaintiff to obtain a diploma from a medical college, and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practice Osteopathy, would be a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, and is in contravention of the 14th Amendment to the Constitution of the United States for the same reason.

7th. Many drugs and medicines being extremely dangerous and poisonous, and their use and administration by persons not ac-

quainted with their properties or effects upon the human system, and their use by persons not qualified to administer drugs and
20 medicines, being a menace to the people of the State generally, if said Chapter 123 is to be construed as authorizing the issuance of a license to practice medicine to an Osteopath, or to any person who has not passed through a course of instruction in Materia Medica, therapeutics and the practice of medicine, that is the practice of administering drugs, then said law, in so far as it authorizes the issuance of a license to practice medicine to such persons, is arbitrary, unreasonable and oppressive, and against the policy of the Constitution of Texas as well as contrary to Section 31 of Article 16 of the Constitution of Texas, and is void as being calculated to expose the people of the State of Texas to the administration of dangerous, poisonous and deadly drugs by persons who do not know and who do not profess to know anything whatever about their properties, their use, their administration, or the conditions under which such drugs should be administered, if administered at all.

8th. Said Chapter 123, if it applies to relator, an Osteopath, or any Osteopath, is in violation of the Constitution of Texas, in this: It discriminates in favor of nurses who practice only nursing, it being well known that such nurses treat minor ailments by the use of medicine, and sometimes without the use of medicine, and charge therefor money or other compensation; and it discriminates in favor of masseurs who in their particular sphere of labor treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body, and charge therefor money or other compensation; and discriminates in favor of druggists who prescribe remedies and charge therefor; and is in violation of the 14th Amendment to the Constitution of the United States for the same reasons.

9th. Said Chapter 123, if it declares that no person shall be allowed to treat any disease, disorder or injury, by any method for compensations, without having a license to practice medicine, is arbitrary, unreasonable and oppressive, and is an unwarranted interference with the rights of many competent intelligent and
21 honorable persons that treat some disease, disorders or injuries, without the knowledge or use of medicine and with the rights of many worthy, intelligent and honorable persons who may desire to be so treated.

10th. If said Chapter 123 of the Acts of 1907 applies to an Osteopath who practices only as such, or applies to relator, then Section 6, Chapter 123, of the Acts of the 30th Legislature of Texas, Regular Session, 1907, discriminates against the relator in providing for the issuance of a verification license to legal practitioners of medicine who were practicing under the provisions of previous laws or under diplomas of reputable and legal colleges of medicine; the Relator, Collins, having been at the time said Act was passed, and having been ever since it was passed, a practitioner of Osteopathy; there being no provision in said law for the issuance of a verification license to relator or other Osteopaths practicing Osteopathy in the State of Texas. And on account of such discrimination, said Section 6 of Chapter 123, is in violation of Section 31 of Article 16 of the

Constitution of Texas, and was also in violation of Section 19 of Article 1 of the Constitution of Texas, and in violation of the 14th Amendment to the Constitution of the United States.

11th. If Chapter 123 of the Acts of the 30th Legislature of Texas, Regular Session 1907, is to be construed as prohibiting any person from treating a disease or disorder of any kind or nature, by any system or method, for pay, unless such person has a license to practice medicine, then said Act particularly, in so far as subdivision 2 of Section 13 is concerned, is unconstitutional and void, in that the effect and tendency of same is to create a monoply in the art of healing among the practitioners of medicine, or those who have licenses to practice medicine, directly in violation of Section 26 of Article 1 of the Constitution of Texas.

12th. If Subdivision 2 of Section 13 of the Acts of 1907 (Chapter 123) is to be held applicable to relator, or anyone simply
22 practicing Osteopathy, then said Chapter 123 is in violation of Section 31 of Article 16 of the Constitution of Texas, and in violation of the 14th Amendment to the Constitution of the United States, in discriminating against an Osteopath, and relator, in requiring that one should have a diploma from a bona fide medical school before he can present himself for examination before the Medical Board of Examiners for a license to practice, and in requiring him to accept a license to practice medicine.

And each and all of said grounds being by the Court upon the trial overruled, the relator by his counsel in open Court excepted to the action of the Court in overruling same separately and particularly and asked that he be allowed his bill of exceptions, which is done accordingly.

Examined and approved this March 27, 1909.

ALBERT S. EYLAR,
County Judge.

(Endorsement:) No. 3687. In Co. Ct. El Paso Co., Tex. Ex parte, Ira W. Collins, Habeas Corpus. Bill of Exceptions. Filed this 27th day of March, A. D. 1909. Park W. Pitman, County Clerk. By C. Aranda, Deputy.

State's Bill of Exceptions No. One.

In the County Court of El Paso County, Texas.

No. 3687.

Ex Parte Ira W. Collins.

Petition for Habeas Corpus.

Be it remembered that upon the trial of the above styled and numbered cause, Dr. Leslye Hyde, a witness for the State of Texas, testified that she had a license to practice medicine in Texas. And

thereafter, on said day, counsel for petitioner, moved the court to strike out said testimony, which motion was sustained by the court, and said testimony striken out. To which counsel for the State then and there in open Court excepted, and asked that they be allowed their bill of exceptions, which is done accordingly, the same being marked No. 1.

23 This bill of exceptions examined, found correct, signed and approved and ordered filed as part of the record in this case this 19th day of April, 1909.

ALBERT S. EYLAR,
County Judge El Paso County, Texas.

O. K.
PATTERSON, BUCKLER & WOODSON,
For Petitioner.

(Endorsement:) No. 3687. In County Court, El Paso Co. Texas. Ex parte Ira W. Collins. Petition for writ of habeas corpus. Bill of exceptions No. 1 for the State of Texas. Filed this 19 day of April, A. D. 1909. Park W. Pitman, County Clerk; By C. Aranda, Deputy.

State's Bill of Exceptions No. Two.

In the County Court of El Paso County, Texas.

No. 3687.

Ex Parte Ira W. Collins.

Petition for Writ of Habeas Corpus.

Be it remembered that on the trial of the above entitled and numbered cause, the State of Texas offered to prove by Dr. H. F. Wright, a witness for the State, while he was on the stand, that he took the examination for his license to practice medicine in Texas on November 10th, 11th and 12th, 1908 and received his certificate about six weeks later, which testimony was objected to by counsel for petitioner on the grounds that the witness had sufficiently qualified, to testify and that it was immaterial and irrelevant, which objection was sustained by the Court, to which action of the court counsel for the State then and there in open Court excepted and asked that they be allowed their bill of exceptions, which is done accordingly, marked No. 2.

This bill of exceptions, examined found correct, signed, approved and ordered filed as a part of the record in this case, this 19th day of April, 1909.

24 ALBERT S. EYLAR,
County Judge El Paso County, Texas.

O. K.
PATTERSON, BUCKLER & WOODSON,
For Petitioner.

(Endorsement:) No. 3687. In County Court, El Paso Co. Texas. Ex parte Ira W. Collins. Petition for writ of habeas corpus. Bill of Exceptions No. 2 for the State of Texas. Filed this 19th day of April, A. D. 1909. Park W. Pitman, County Clerk. By C. Aranda, Deputy.

State's Bill of Exceptions No. Three.

In the County Court of El Paso County, Texas.

No. 3687.

Ex Parte Ira W. Collins.

Be it remembered that on the trial of the above styled and numbered cause, while the witness Dr. H. F. Wright, a witness for the State, was on the stand, the State offered to prove by the said witness that he took the State Board examination given by the board of examiners for the State of Texas in November, 1908; that he passed the said examination in all of the subjects required by said examination; that the said examination covered the subjects following and only the following: Anatomy, Physiology, Chemistry, Histology, Pathology, Bacteriology, Physical Diagnosis, Surgery, Obstetrics, Gynecology, Hygiene and Medical Jurisprudence, and that no examination was required by the said Board in either the subjects of materia medica or therapeutics of any kind.

To which testimony counsel for petitioner objected for the reason that the action of the State Board in the premises would not be admissible, for the reason that the court would not be either bound or effected by the action of the State Board of Medical examiners in passing upon either the applicability or validity of Chapter 123 of the laws of 1907 in so far as an osteopath is concerned, which objections the court sustained and excluded said testimony, to which action of the court counsel for the State then and there in open court excepted, and asked that they be allowed their bill of exceptions, which is done accordingly, marked No. 3.

This bill of exceptions examined, approved, found correct, signed and ordered filed as a part of the record in this cause this 19th day of April, 1909.

ALBERT S. EYLAR,
County Judge, El Paso Co., Texas.

O. K.
PATTERSON, BUCKLER & WOODSON,
For Petitioner.

(Endorsement:) No. 3687. In County Court, El Paso Co., Texas. Ex parte Ira W. Collins. Petition for writ of habeas corpus. Bill of Exceptions No. 3 for the State of Texas. Filed this 19th day of April, A. D. 1909. Park W. Pitman, County Clerk. By C. Aranda, Deputy.

Assignment of Errors.

In the County Court of El Paso County, Texas.

No. 3687.

Ex Parte IRA W. COLLINS.

Comes now the petitioner, Ira W. Collins, and files the following assignments of error, herein:

I. The Court erred on the final hearing of the application for a writ of habeas corpus herein in its judgment remanding the petitioner to the custody of the sheriff of El Paso County, Texas, and in not discharging petitioner upon the final hearing hereof from further custody.

II. The court erred in not holding and deciding that the words "any system or method" in Subdivision 2, of Section 13, Chapter 123 of the Acts of 1907, 30 Leg. of the State of Texas,
26 should be construed as referring to any system or method of medicine or surgery; that is, any system or method in which drugs are used, and should not be construed as applying to a system or method in which medicine or surgery are not used, and in not discharging the petitioner from custody for said reason.

III. The court erred in not holding that Chap. 123 of the Acts of the 30 Leg., approved April 17, 1907, was violative of the Constitution of the State of Texas (and the Constitution of the United States) and void, in so far as the petitioner is concerned, as said chapter declares in its title that its purpose was "to define and regulate the practice of medicine and to create a board of medical examiners for the examination and licensing of physicians and surgeons, and to prescribe their qualifications, etc." and it is nowhere expressed in the title to said act that it was the purpose of the Legislature to declare that the treatment of any disease or disorder by any system or method, for compensation or pay, should be regarded as the practice of medicine, and it is nowhere expressed in said title that it was the purpose of the act to require any person treating any disease, disorder or injury by any method, other than the practice of medicine, to obtain a license to practice medicine.

IV. The court erred in not holding that the declaration that the treatment of any disease or disorder by any method in which drugs, medicine or surgery are not used in the practice of medicine was false, arbitrary, unreasonable, and oppressive, and beyond the power of the Legislature—the framers of the Constitution in referring to the qualifications of practitioners of medicine having evidently had in mind the *practitioners* of the art of healing requiring and involving the use of medicine and drugs, and requiring and involving a knowledge of materia medica, therapeutics, and the practice of medicine.

27 V. Inasmuch as the complaint and information upon which the relator is being prosecuted, and upon which he was

arrested and held in custody, simply charged, substantially, that relator treated Julia Ballinger for hay fever, for pay, by kneading and rubbing, relator should have been discharged by the trial court, and the court erred in not discharging him, as the Legislature would have no authority to enact a law making such an act a crime or misdemeanor, or to declare that such an act could only be performed by one having a license to practice medicine, or to enact a law making the criminality of such an act depend upon whether or not the operator received pay for his service or to enact such a law confining the treatment of all disorders of whatever nature, however insignificant, to those who might have a license to practice medicine.

VI. The relator, having established himself in the practice of osteopathy, prior to the passage of the act of 1907 to-wit: said Chap. 123, and being engaged in the business of said profession at said time, under a diploma from the American School of Osteopathy, at Kirksville, Missouri, and his business or profession before that time having been recognized by the Legislature of Texas as not being the practice of medicine, the application of said Chapter 123 to him, and the requiring him under said Chapter 123 to obtain either the verification license mentioned in section 6 of said act, or to require him to obtain a license to practice medicine as provided in sections 7 and 9 of said act, was in violation of section 19 of the Bill of Rights of the State of Texas, which declares that "no citizen shall be deprived of property, privileges or immunities except by due course of the law of the land," and was in direct violation of the 14th Amendment to the Constitution of the United States which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and the Court erred in not dis-
28 charging the relator for said reason.

VII. If relator practicing osteopathy, as shown by the evidence, was practicing medicine at the time said Chapter 123 went into effect, on account of the fact that he treated some diseases by the principles of osteopathy, and osteopathy was at the time said Chapter 123 went into effect a school of medicine and is now a school of medicine, then said Chapter 123 is directly in violation of Section 31 of Article 16 of the Constitution of Texas, which provides that "in prescribing the qualifications of practitioners of medicine the Legislature shall not give preference to any school of medicine, and to require plaintiff to obtain a diploma from a medical college and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practice osteopathy would be a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, and would be in contravention of the 14th Amendment to the Constitution of the United States for the same reason, and for these reasons the trial court erred in not discharging the relator upon the final hearing of this case, and erred in remanding him to the custody of the sheriff.

VIII. Many drugs and medicines being extremely dangerous and poisonous, and their use and administration by persons not acquainted with their properties or effects upon the human system, and their use by persons not qualified to administer drugs and medicines being a menace to the people of the state generally, if said Chapter 123 is to be constructed as authorizing the issuance of a license to practice medicine to osteopaths, or to any person who has not passed through a course of instruction in materia medica, therapeutics, and the practice of medicine, that is, the practice of administering drugs, then said law in so far as it authorizes the issuance of a license to practice medicine to such persons is arbitrary, unreasonable and oppressive, and against the policy of the Constitu-
29 tion of Texas, as well as contrary to Section 31 of Article 16 of the Constitution of Texas, and is void as being calculated to expose the people of the State of Texas to the administration of dangerous, poisonous and deadly drugs by persons not possessing and not professing to possess any knowledge whatever about their properties, their use, their administration, or the conditions under which such drugs should be administered, if administered at all, and for these reasons the trial court erred in not discharging the relator and in remanding him to the custody of the sheriff on the final hearing of said cause.

IX. Said Chapter 123 of the Acts of the Legislature of Texas, if it applies to relator, an osteopath, or to any osteopath, is violative of the Constitution of Texas, in this: It discriminates in favor of nurses, who practice only nursing, it being well known that such nurses treat minor ailments by the use of medicines, and sometimes without the use of medicine, and charge therefor money or other compensation, and it discriminates in favor of masseurs who, in their particular sphere of labor, treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body, and charge therefor money and other compensation, and discriminates in favor of druggists who prescribe remedies and charge therefor, and is, for these reasons, violative of the 14th Amendment to the Constitution of the United States, and the trial court erred in remanding the relator to the custody of the sheriff of El Paso County, and in not discharging him from custody upon the final hearing of this cause.

X. Said Chapter 123, if it declares that no person shall be allowed to treat any disease, disorder or injury by any method, for compensation, without having a license to practice medicine, is arbitrary, unreasonable and oppressive, and is an unwarranted interference with the rights of many competent and honorable persons who treat diseases, disorders or injuries without the knowledge or use of medicine, and also interferes with the rights of many worthy, competent and honorable persons who may desire to be so
30 treated, and for this reason said act should have been held void, and the relator discharged and the trial court erred in remanding relator to the custody of the sheriff and not discharging him upon the final hearing of this cause.

XI. If said Chapter 123 of the acts of 1907 applies to an osteopath

who practices only as such, or applies to relator, then section 6, Chap. 123 of the Acts of the 30th Leg. of Texas, Reg. Session, 1907, discriminates against the relator in providing for the issuance of a verification license to legal practitioners of medicine who are practicing under the provisions of previous laws, or under diplomas of reputable and legal colleges of medicine, the relator Ira W. Collins having been at the time said act was passed, and having been ever since it was passed a practitioner of osteopathy. There being no provision in said law for the issuance of a verification license to relator, or other osteopaths practicing osteopathy in the state of Texas, on account of such discrimination said Section 6 of Chap. 123, is violative of Section 31 of Article 16 of the Constitution of the State of Texas, and also a violation of Section 19 of Article 1, Constitution of Texas, and in violation of the 14th Amendment to the Constitution of the United States, and for this reason the trial court erred in not holding said act and said section void, and in not discharging the relator from further custody upon the final hearing hereof.

XII. If Chap. 123 of the Acts of the 30th Legislature of Texas, Regular Session, 1907, is to be construed as prohibiting any person from treating any disease or disorder of any kind or nature, by any system, or method, for pay, unless such person has a license to practice medicine, then said act, particularly in so far as Subdivision 2 of Section 13 is concerned, is unconstitutional and void, in that the effect and tendency of the same is to create a monop-ly in the art of healing among the practitioners of medicine or those who have licenses to practice medicine, and is directly in violation of Section 26 of Article 1 of the Constitution of Texas, and for
31 this reason the trial court should have held said act and said sections void, and should have discharged the relator on final hearing hereof.

XIII. If subdivision 2 of section 13 of the Acts of 1907, Chap. 123, is to be held applicable to relator or anyone simply practicing osteopathy, then said Chapter 123 is in violation of Section 31 of Article 16 of the Constitution of Texas and in violation of the 14th Amendment to the Constitution of the United States in discriminating against an osteopath, and relator, in requiring that one should have a diploma from a bona fide medical school before he can present himself for examination before the medical board of examiners for a license to practice, and in requiring him to accept a license to practice medicine, and the court erred in not holding said sections void, and in not discharging the relator from custody upon final hearing of this cause.

PATTERSON, BUCKLER & WOODSON,
Attorneys for Petitioner.

(Endorsement:) No. 3687. Co. Court. Ira W. Collins, Ex parte. No. 3687. Filed this 7th day of May, A. D. 1909. Park W. Pitman, County Clerk. By C. Aranda, Deputy.

Cross-assignments of Error.

In the County Court of El Paso County, Texas.

No. 3687.

Ex Parte Ira W. Collins.

Now comes the State of Texas, by W. W. Bridgers, its County Attorney in and for El Paso County, Texas, and Earl & Elfers, Special Counsel for the State of Texas, and files the following cross-assignments of error herein, as follows:

1. The Court erred in sustaining the motion of petitioner's counsel to strike from the record the testimony of Dr. Leslye Hyde
32 that she had a license to practice medicine in Texas.

2. The Court erred in sustaining the objection of petitioner's counsel to testimony of Dr. H. F. Wright, a witness for the State, to the effect that he, the said witness, H. F. Wright took the examination to receive his license to practice medicine in Texas November 10th, 11th and 12th of last year, and received his certificate about six weeks later.

3. The court erred in sustaining the objection of petitioner's counsel to the testimony of Dr. H. F. Wright, a witness for the State, that he took the examination given by the Board of Medical Examiners for the State of Texas in November, 1908; that he passed said examination in all of the subjects required by said examination; that the said examination covered the subjects following, and only the following: Anatomy, physiology, chemistry, histology, pathology, bacteriology, physicial diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence, and that no examination was required by the said Board in either the subjects of materia medica nor therapeutics of any kind.

W. W. BRIDGERS,
County Attorney.
EARL & ELFERS,
Special Counsel for the State of Texas.

(Endorsement:) No. 3687. In County Court, El Paso Co., Texas. Ex parte Ira W. Collins. Petition for writ of habeas corpus. Cross-assignments of error by State of Texas. Filed this 22 day of April, A. D. 1909. Park W. Pitman, County Clerk. By Edwin Fowler, Deputy.

33 *Certificate of Clerk.*

The State of Texas,
County of El Paso:

I, Park W. Pitman, Clerk of the County Court of El Paso County, Texas, do hereby certify that the above and foregoing transcript, consisting of 38 pages, besides this, contains a true and correct tran-

script of copy of all the proceedings had in said court in the cause therein pending, to-wit: No. 3687, Ex parte Ira W. Collins (Habeas Corpus) as same appears from the original papers in said cause now on file in my office and from the records of said cause in the minutes of said county court.

In testimony whereof, witness my official signature and seal of said court at office in El Paso, Texas, this 29th day of May, A. D. 1909.

PARK W. PITMAN,
Clerk County Court, El Paso County, Texas,
By EDWIN FOWLER, *Deputy.*

(Endorsed:) No. 60/4209. Ex parte Ira W. Collins. From the County Court, El Paso County. Applied for by Patterson, Buckler & Woodson, attorneys for appellant. Filed in Court of Criminal Appeals at Austin, Texas, Jun- 4, 1909. E. P. Smith, Clerk.

34 *Order Submitting Cause.*

No. 60/4209.

Ex Parte IRA W. COLLINS.

WEDNESDAY, *June* 9, 1909.

Submitted on briefs and oral arguments for both parties.

Judgment.

SATURDAY, *June 19th*, 1909.

No. 60/4209.

Ex Parte IRA W. COLLINS.

Appeal from El Paso County Affirmed.

Opinion by Brooks, Judge.

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

35 *Opinion.*

60/4209.

Ex Parte Ira W. Collins.

From El Paso County.

Relator, being a physician, practicing Osteopathy, in the City of El Paso, in El Paso County, failed to secure his license to so practice as had been authorized by the acts of the 30th Legislature, Chapter CXXIII page 224. Upon failing to secure the license as provided in said act he was arrested on proper complaint and information filed in the county court of El Paso county, and sued out an application for writ of habeas corpus before the County Judge, and upon the hearing of said application relator was remanded to the custody of the sheriff of El Paso County.

The information, which in all respects is in conformity with the affidavit, is as follows: "W. W. Bridgers, County Attorney of the County of El Paso, State of Texas, presents to the County Court in and for said County, at its January Term, A. D. 1909, that on or about the 2nd day of September, A. D. 1908, and before the filing of this information, in said County of El Paso, State of Texas, Ira W. Collins, who was then and there a resident of said County of El Paso and State of Texas, did then and there practice medicine upon human beings within the limits of the State of Texas, and County of El Paso, without authority of law, to-wit: Did then and there in the manner hereinbefore and hereinafter stated, unlawfully treat a physical disease and disorder, to-wit: Did then and there unlawfully treat Julia Ballinger, a human being, for hay fever, said hay fever being a physical disease and disorder, and did charge the said Julia Ballinger therefor, directly, money the value and amount of which is to the County Attorney unknown said treatment being given in the capacity of a physician and doctor, under the system and branch of medicine called osteopathy, by means of a system of doctor-
36 ing and physical treatment called 'Osteopathy', which treatment consists and did then and there consist in manipulating scientifically the limbs, muscles, ligaments and bones of the human body and of the said Julia Ballinger, which pressed upon the nerves of the blood supply so that nature might have free action, the natural blood supply be restored, and the diseased condition thus removed so unlawfully treating in the County of El Paso, State of Texas, in which the said Ira W. Collins then and there resided, all of which said treatment was given in violation of the provisions of Chapter CXXIII, Acts of the 30th Legislature of the State of Texas, without having first registered in the District Clerk's Office of El Paso County, Texas, the County in which he, the said Ira W. Collins, then and there resided, his authority from the Board of Medical Examiners for the State of Texas for so practicing, together with his age, post-office address, place of birth, school of practice to

which he then and there professed to belong, subscribed and verified by oath, as prescribed and required by the provisions of Chapter CXXIII of the General Laws of the State of Texas, Acts of the 30th Legislature of Texas, page 224 et seq., and against the peace and dignity of the State."

The evidence in the case as adduced upon the trial of the writ of habeas corpus substantiated every allegation in the information, and upon this showing the relator demands his discharge on the ground that the act is unconstitutional, which provides that an osteopath should pay a license, because the evidence shows that the relator used no medicine or drugs to relieve the patient, therefore, there was no evidence from which the court could conclude the relator should be held in custody upon a charge of practicing medicine without a license. Section 13 of the act of the 30th Legislature, above cited, reads as follows: "Any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method or to effect cures thereof. (2). Or who shall treat or offer to treat any disease or disorder, mental
37 or physical, or any physical deformity or injury by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." We hold that the court was correct in his decision, and that the statute expressly authorized the court in remanding relator, and that the statute in all respects is constitutional.

Relator further insists that section 31, of article 16 of the Constitution, which says that the Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and punish persons for malpractice, but no preference shall ever be given by law to any school of medicine, limits the power of the Legislature in authorizing the licensing of practitioners to practitioners of medicine, and that in view of the fact that relator in practicing osteopathy uses no medicine that, therefore, relator does not come within the provisions of the act. As we understand relator in his brief and argument, he concedes that the statute is broad enough to cover his offense, but that the constitutional provision just cited limits the power of the Legislature to the regulation of the practice of medicine, and that osteopathy is not practicing medicine. The Constitution when it demands the regulation of the practice of medicine, was not attempting to say that the Legislature was limited to any mode or method of healing in order to regulate it, but the word "medicine" used in the Constitution means the art of healing by whatever scientific or supposedly scientific method may be used. It means the art of preventing, curing or alleviating diseases and remedying, as far as possible, results of violence and accident. It further means something which is supposed to possess, or some method which is supposed to possess curative power, but if this definition of medicine is not correct, as stated in the Constitution, yet there is no limitation upon the power of the Legislature in said provision of the Constitution which inhibits the Legislature of this

State under its police power to prevent any one practicing any species or character of remedy to cure any real or supposed ill that the body has or is subject to, for pay. Acts with somewhat similar provisions to the acts of the 30th Legislature now under con-
38 sideration were held constitutional by the Supreme Court of this State in the case of Dowell v. McBride, 92 Texas, 239; also by this court in the case of Logan v. State, 5 Tex. Cr. App. 306. So we hold that osteopathy is one of the methods of curing the ills to which human flesh is heir, and is one of the methods of curing covered by the act of the 30th Legislature. In other words, in order for one in this State to practice osteopathy for pay, he must secure a license, as provided for by the act of the 30th Legislature. This relator did not do. We accordingly hold that he must be remanded to the custody of the sheriff of El Paso County where he will be called upon to answer the complaint and information relied upon in this case.

The judgment is accordingly affirmed.

BROOKS, *Judge.*

(Delivered June 19, 1909.)

(Endorsed:) No. 60/4209. Ex parte Ira W. Collins. Appeal from El Paso County. Affirmed. Opinion by Brooks, Judge. Filed in Court of Criminal Appeals, at Austin, Texas, June 19, 1909. E. P. Smith, Clerk.

Motion for Rehearing.

No. 60/4209.

Ex Parte Ira W. Collins.

Appeal from El Paso County.

Habeas Corpus.

To the Honorable Court of Criminal Appeals, at Austin, Texas:

Now comes the appellant, Ira W. Collins, in the above styled cause and respectfully asks the court to grant a rehearing and reverse the judgment and opinion heretofore rendered in said cause on the 19th day of June, 1909, and to enter a judgment discharging him from the custody of the sheriff of El Paso county, Texas, for the following reasons:

1. This Honorable Court erred in stating in its opinion
39 that the relator in his brief and argument conceded that the statute under which the relator was being prosecuted is broad enough to cover the offense charged against him, but that the constitutional provision, to-wit: section 31 of article 16 of the Constitution of Texas limits the power of the Legislature to the regulation of the practice of medicine, and that osteopathy is not practicing medicine. The relator never by himself nor by his attorneys in their brief and argument made any such concession, but in their

second assignment of error presented distinctly the point and proposition that the words "any system or method" used in subdivision 2 of section 13, chapter 123, of the Acts of 1907 (30th Legislature of Texas) should be considered as referring only to any system or method of medicine and surgery, that is, any system or method in which drugs are used, and should not be considered as applying to a system or method in which medicine or surgery are not used.

And in this connection the attorneys for the relator cited (together with other authorities) the case of Nelson v. State Board of Health, 57 S. W. p. 501 (Ky.) which the Court of Appeals of Kentucky in construing a statute like the one under consideration said it did not apply to an osteopath and did not apply in a case like that at bar. Nearly all of the provisions of Chapter 123 of our act of 1907 seem to have been taken almost verbatim from the Kentucky statute, and the Court of Appeals of Kentucky held that an osteopath under such a statute is not a physician or surgeon, and that he did not practice medicine and held that the words in the statute like ours "any system or method" referred to "any system, or method of medicine or surgery," and held that an osteopath was not a practitioner of medicine under such a statute.

II. This Court erred in refusing to sustain and in overruling appellant's first assignment of error, which was as follows: "First Assignment of Error. The Court erred on the final hearing of the application for a writ of habeas corpus herein in its judgment remanding the petitioner to the custody of the sheriff of El Paso County, Texas, and in not discharging petitioner upon the
10 final hearing hereof from further custody.

Proposition.

As the evidence simply showed that relator had manipulated the bones, muscles and ligaments of a lady to relieve her of hay fever, and that he used no medicine or drugs to so relieve her, there was no evidence from which the court could conclude that relator should be held in custody upon a charge of practicing medicine without a license, in doing the single act mentioned."

III. This court erred in refusing to sustain and in overruling appellant's second assignment of error, which was as follows: "Second Assignment of Error. The court erred in not holding and deciding that the words "any system or method" in Subdivision 2 of Section 13, Chapter 123 of the Acts of 1907, 30th Legislature of the State of Texas, should be construed as referring to any system or method of medicine or surgery; that is, any system or method in which drugs, etc. are used, and should not be construed as applying to a system or method in which medicine or surgery are not used, and in not discharging the petitioner from custody for said reason."

IV. This court erred in refusing to sustain and in overruling appellant's third assignment of error which was as follows: "Third Assignment of Error. The court erred in not holding that the declaration that the treatment of any disease or disorder by any method in which drugs, medicine or surgery are not used is the practice of

medicine, was false, arbitrary, unreasonable and oppressive, and beyond the power of the Legislature—the framers of the Constitution in referring to the qualifications of practitioners of medicine having evidently had in mind the practitioners of the art of healing requiring and involving the use of medicine and drugs, and requiring and involving a knowledge of materia medica, therapeutics, and the practice of medicine."

V. This court erred in refusing to sustain and in overruling appellant's fourth assignment of error, which was as follows: "Fourth Assignment of Error. Inasmuch as the complaint and information upon which the relator is being prosecuted, and upon which he was arrested and held in custody, simply charged, substantially, that relator treated Julia Ballinger for hay fever, for pay, by kneading and rubbing, the relator should have been discharged by the trial court; and the court erred in not discharging him, as the Legislature would have no authority to enact a law making such an act a crime or misdemeanor, or to declare that such an act could only be performed by one having a license to practice medicine, or to enact a law making the criminality of such an act depend upon whether or not the operator received pay for his service or to enact such a law confining the treatment of all disorders of whatever nature, however insignificant, to those who might have a license to practice medicine."

VI. This court erred in refusing to sustain and in overruling appellant's fifth assignment of error, which was as follows: "Fifth Assignment of Error. The court erred in not holding that Chapter 123 of the Acts of the 30th Legislature, approved April 17, 1907, was violative of the Constitution of the State of Texas (and the Constitution of the United States) and void, in so far as the petitioner is concerned, as said chapter declares in its title that its purpose was "to define and regulate the practice of medicine and to create a Board of Medical Examiners for the examination and licensing of physicians and surgeons, and to prescribe their qualifications, etc." And it is nowhere expressed in the title to said act, that it was the purpose of the Legislature to declare that the treatment of any disease or disorder by any system or method for compensation or pay, should be regarded as the practice of medicine, and it is nowhere expressed in said title that it was the purpose of the act to require any person treating any disease, disorder or injury by any method, other than the practice of medicine, to obtain a license to practice medicine."

VII. This Court erred in refusing to sustain and in overruling appellant's sixth assignment of error, which was as follows: "Sixth Assignment of Error. The relator having established himself in the practice of osteopathy prior to the passage of the act of 1907, to-wit: said Chapter 123, and being engaged in the business of said profession at said time under a diploma from the American School of Osteopathy at Kirksville, Missouri, and his business or profession before that time having been recognized by the Legislature of Texas as not being the practice of medicine, the application of said Chapter 123 to him, and the requiring him under said Chapter 123 to obtain either the verification license mentioned in

section 6 of said act or to require him to obtain a license to practice medicine as provided in sections 7 and 9 of said act, was in violation of section 19 of the Bill of Rights of the State of Texas, which declares that "no citizen shall be deprived of property, privileges or immunities except by due course of the law of the land," and was in direct violation of the 14th Amendment to the Constitution of the United States which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and the court erred in not discharging the relator for said reason."

It was admitted upon the trial in the County Court that the relator, Ira W. Collins, is a citizen of the United States, has been a resident of El Paso County and a citizen of the State of Texas for about six years, practicing in the city of El Paso during all of said time as a doctor of osteopathy; that prior to his coming to El Paso, in the year 1903, he graduated as a doctor of osteopathy after a full two years' course of instruction at the American School of Osteopathy at Kirksville, Missouri, and received in the Spring of 1903 a diploma which he now has and ever since has had from said American School of Osteopathy; and that the relator and the other graduates of said school do not use and have never used in their practice in the treatment of disease or sickness any drug or
43 medicine, but their treatment consists and at all times has consisted in manipulating scientifically, as taught in said school of osteopathy, the limbs, muscles, ligaments and bones pressing on the blood supply, so that nature may have free action and the natural blood supply be restored and the diseased condition thus removed.

It was also admitted that said American School of Osteopathy was chartered in the State of Missouri in 1892, and 1894, by a regular charter under which said school has since been operating; and it was further admitted that said American School of Osteopathy does not teach and has never taught thereapeutics or materia medica, its theory being that a large number of ailments are due to irregular nerve action, and that by stimulating or repressing the nerve centers by manipulation, nature herself is enabled to right the evil; it administers no drugs. And said School of Osteopathy does not teach and has never taught either the properties, nature or effects of drugs or medicines, or how to compound them or administer them, or for what maladies they are to be used; but said school teaches and always has taught its students and its graduates to discard the use of drugs and medicines. It was also admitted that there are now various well equipped colleges of osteopathy in the United States; that there were in the State of Texas at the time said Chapter 123 of the Acts of 1907 was passed several hundred practitioners of osteopathy in the State of Texas; and it was further admitted that at the time said Chapter 123 of the acts of the 30th Legislature of Texas was passed he relator Ira W. Collins had already established himself in the city of El Paso, Texas, as a practitioner of osteopathy, and had expended

the sum of $5,000 in improving and fitting up his place of business with conveniences, etc. suitable for his business in said city, which place of business, fitted up at said expense he now occupies and ever since has occupied; that ever since 1903 he has followed and now follows said profession of osteopathy for a living; that his annual income and practice as an osteopapth at the time said law was passed, in the year 1907, was and ever since has been and now
44 is of the gross annual value of more than $10,000 and the net value of at least $5,000.

In the case at bar Ira W. Collins was not charged with the offense of practicing osteopathy and publicly professing to be a physician, without license, but he was charged with the offense of treating a human being, to-wit: Julia Ballinger, on one particular occasion for hay fever, and charging her therefor, by means of a system of osteopathy, said treatment being set forth and described on one particular occasion in the complaint and information on file.

Dr. Charles T. Race, who is a physician of the Alopathic School of Medicine, testified, that the basic studies taught in all reputable medical schools are the basic branches—anatomy, physiology, chemistry, thereapeutics, materia medica, practice of medicine and surgery, hygiene, obstetrics and diseases of women and children; that he could not conceive of a reputable medical school that did not teach the branches mentioned.

VIII. This Court erred in refusing to sustain and in overruling the appellant's seventh assignment of error, which was as follows: "Seventh Assignment of Error. Many drugs and medicines being extremely dangerous and poisonous, and their use and administration by persons not acquainted with their properties or effects upon the human system, and their use by persons not qualified to administer drugs and medicines being a menace to the people of the state generally, if said Chapter 123 is to be construed as authorizing the issuance of a license to practice medicine to osteopaths, or to any person who has not passed through a course of instruction in matera medica, thereapeutics and the practice of medicine, that is, the practice of administering drugs, then said law in so far as it authorizes the issuance of a license to practice mediene to such persons is arbitrary, unreasonable and oppressive, and against the policy of the Constitution of Texas, as well as contrary to section 31 of article 16 of the Constitution of Texas, and is void as being
45 calculated to expose the people of the State of Texas to the administration of dangerous, poisonous and deadly drugs by persons not possessing and not professing to possess any knowledge whatever about their properties, their use, their administration, or the conditions under which such drugs should be administered, if administered at all, and for these reasons the trial court erred in not discharging the relator and in remanding him to the custody of the sheriff on the final hearing of said cause."

IX. This court erred in refusing to sustain and in overruling appellant's eighth assignment of error, which was as follows: "Eighth Assignment of Error. Said chapter 123 of the acts of the Legislature of Texas, if it applies to relator, as an osteopath, or to

any osteopathy, is violative of the Constitution of Texas, in this: It discriminates in favor of nurses who practice only nursing, it being well known that such nurses treat minor ailments by the use of medicine, and sometimes without the use of medicine, and charge therefor money or other compensation, and it discriminates in favor of masseurs who, in their particular sphere of labor, treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body, and charge therefor money and other compensation, and discriminates in favor of druggists who prescribe remedies and charge therefor, and is, for these reasons, violative of the 14th Amendment to the Constitution of the United States, and the trial court erred in remanding the relator to the custody of the sheriff of El Paso County, and in not discharging him from custody upon the final hearing of this cause.

X. This court erred in refusing to sustain and in overruling appellant's ninth assignment of error, which was as follows: "Ninth Assignment of Error. Said Chapter 123, if it declares that no person shall be allowed to treat any disease, disorder or injury by any method, for compensation, without having a license to practice medicine, is arbitrary, unreasonable and oppressive, and is an unwarranted interference with the rights of many competent
46 and honorable persons who treat diseases, disorders or injuries without the knowledge or use of medicines, and also interferes with the rights of many worthy, competent and honorable persons who may desire to be so treated, and for this reason said act should have been held void, and the relator discharged and the trial court erred in remanding relator to the custody of the sheriff and not discharging him upon the final hearing of this cause."

XI. This court erred in refusing to sustain and in overruling appellant's tenth assignment of error, which was as follows: "Tenth Assignment of Error. If said Chapter 123 of the Acts of 1907 applies to an osteopath who practices only as such, or applies to relator, then section 6, chapter 123 of the Acts of the 30th Legislature of Texas, Regular Session, 1907, discriminates against the relator in providing for the issuance of a verification license to legal practitioners of medicine who are practicing under the provisions of previous laws, or under diplomas of reputable and legal colleges of medicine, the relator Ira W. Collins having been at the time said act was passed, and having been ever since it was passed a practitioner of osteopathy. There being no provision in said law for the issuance of a verification license to relator, or other osteopaths, practicing osteopathy in the State of Texas, on account of such discrimination said section 6 of Chapter 123 is violative of section 31 of article 16 of the Constitution of the State of Texas, and also a violation of section 19 of Article 1 of the Constitution of Texas, and in violation of the 14th Amendment to the Constitution of the United States, and for this reason the trial court erred in not holding said act and said section void, and in not discharging the relator from further custody upon the final hearing hereof."

XII. The court erred in refusing to sustain and in overruling appellant's eleventh assignment of error, which was as follows:

"Eleventh Assignment of Error. If Chapter 123 of the Acts of the 30th Legislature of Texas, Regular Sessison 1907, is to be
47 construed as prohibiting any person from treating any disease or disorder of any kind or nature, by any system or method, for pay, unless such person has a license to practice medicine, then said act, particularly in so far as subdivision 2 of section 13 is concerned, is unconstitutional and void, in that the effect and tendency of the same is to create a monoply in the art of healing among the practitioners of medicine or those who have licenses to practice medicine, and is directly in violation of section 26 of Article 1 of the Constitution of Texas, and for this reason the trial court should have held said act and said section void, and should have discharged the relator on final hearing hereof."

XIII. This court erred in refusing to sustain and in overruling appellant's twelfth assignment of error, which was as follows: "Twelfth Assignment of Error. If subdivision 2 of section 13 of the Acts of 1907, Chapter 123, is to be held applicable to relator or anyone simply practicing osteopathy, then said Chapter 123 is in violation of section 31 of Article 16 of the Constitution of Texas and in violation of the 14th Amendment to the Constitution of the United States in discriminating against an osteopath, and relator, in requiring that one should have a diploma from a bona fide medical school before he can present himself for examination before the medical board of examiners for a license to practice, and in requiring him to accept a license to practice medicine, and the court erred in not holding said subdivision void, and in not discharging the relator from custody upon final hearing of this case."

XIV. This court erred in refusing to sustain and in overruling appellant's thirteenth assignment of error, which was as follows: "Thirteenth Assignment of Error. If relator, practicing osteopathy as shown by the evidence, was practicing medicine at the time said Chapter 123 went into effect, on account of the fact that he treated some diseases by the principles of osteopathy, and osteopathy was at the time said Chapter 123 went into effect a school of medicine, and is now a school of medicine, then said Chapter 123 is in direct viola-
tion of Sec. 31 of Art. 16 of the Constitution of Texas, which
48 provides that "in prescribing the qualifications of practitioners of medicine the Legislature shall not give preferen*de* to any school of medicine," and to require plaintiff to obtain a diploma from a medical college and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practice osteopathy would be a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry, and the practice of medicine, and would be in contravention of the 14th Amendment to the Constitution of the United States for the same reason, and for those reasons the trial court erred in not discharging the relator upon the final hearing of this case, and erred in remanding him to the custody of the sheriff."

We respectfully refer to brief of the appellant heretofore filed in the above styled cause, and ask the court to reconsider said assign-

ments of error presented, and read the same, and the authorities and remarks presented under the same respectively, and we respectfully ask this Honorable Court to pass specifically upon each and every of the thirteen assignments of error presented in this motion for rehearing, which were presented in the brief heretofore filed in the above styled cause.

And the relator asks that the judgment and opinion in said cause heretofore rendered be set aside and held for naught, and that this Honorable Court render judgment discharging him from the custody of the sheriff of El Paso County, Texas.

The residence of Honorable Felix J. McCord, Assistant Attorney General, who represents the State of Texas in the above styled cause, is Austin, Texas.

Respectfully submitted,

PATTERSON, BUCKLER & WOODSON,

Attorneys for Appellant.

(Endorsed) No. 60/4209. In Court of Crim. App. at Austin, Tex. Ex parte Ira W. Collins. Motion for Rehearing. Filed in Court of Criminal Appeals, at Austin, Texas, June 30, 1909. E. P. Smith, Clerk.

49 *Order Submitting Motion for Rehearing.*

MONDAY, *October 4th*, 1909.

No. 60/4209.

EX PARTE IRA W. COLLINS.

Appeal from El Paso County.

Submitted on relator's motion for rehearing.

Order Overruling Motion for Rehearing.

WEDNESDAY, *October 6th*, 1909.

No. 60/4209.

Ex parte IRA W. COLLINS.

Appeal from El Paso County.

(No written opinion.)

This cause came on to be heard on the relator's motion for rehearing, and the same being considered by the Court is overruled.

Petition for Writ of Error.

In the Court of Criminal Appeals of the State of Texas, at Austin, Texas.

No. 60/4209.

Ex parte Ira W. Collins.

Ira W. Collins, Appellant,
vs.
The State of Texas, Appellee.

To the Honorable W. L. Davidson, Presiding Judge of the Court of Criminal Appeals, at Austin, Texas:

Now comes Ira W. Collins, the above named appellant and relator by his attorney, and says that he is a citizen of the United States of America; that in the above entitled cause on — 19th
50 day of June, 1909, final judgment was rendered against your petitioner by the Court of Criminal Appeals at Austin, Texas (and his motion for a rehearing in said cause was overruled by said Court on October 6th, 1909) wherein it was adjudged that your petitioner should not be discharged from custody, on account of an alleged violation by him of the provisions of Chap. 123 of the Acts of the 30th Legislature of Texas (1907) and particularly subdivision 2, of Sec. 13 of said Chapter, and it was adjudged that said act was not in violation of the 14th Amendment to the Constitution of the United States against his plea. And your petitioner avers that in said final order and judgment and the proceedings had prior thereunto in said cause, divers errors were committed to the prejudice of said Ira W. Collins, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Court of Criminal Appeals of Texas, is the highest court of the said State of Texas in which a decision in this suit and this matter could be had.

Wherefore your petitioner, Ira W. Collins, prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Court of Criminal Appeals of the State of Texas, at Austin, Texas, for the correction of errors so complained of, and a transcript of the record proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Dated this November 8th, 1909.

MILLARD PATTERSON,
Attorney for Ira W. Collins, Petitioner.

Order Granting Writ of Error.

The writ of error as prayed for in the foregoing petition is allowed upon the execution of a bond by petitioner, Ira W. Collins, in the sum of $300.00. Dated this Nov. 8th, 1909.

W. L. DAVIDSON,
Presiding Judge of the Court of Criminal Appeals of Texas.

51 (Endorsed:) No. 60/4209. In Ct. Criminal Appeals, at Austin, Texas. Ira W. Collins, appellant vs. The State of Texas, appellee. Ex parte Ira W. Collins (Habeas Corpus). Petition for a writ of error from U. S. Supreme Court. Filed in Court of Criminal Appeals, at Austin, Texas, November 8th, 1909. E. P. Smith, Clerk.

Writ of Error Bond.

In Court of Criminal Appeals, at Austin, Texas.

No. 60/4209.

IRA W. COLLINS, Appellant,
vs.
THE STATE OF TEXAS, Appellee.

Know all men by these presents, that we, Ira W. Collins, as principal, and The United States Fidelity & Guaranty Co. as surety, are held and firmly bound unto the State of Texas in the sum of three hundred ($300.00) Dollars to be paid to the said obligee, or its representatives, to the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and firmly by these presents.

Sealed with our Seal and dated this 8th day of November, 1909.

Whereas the above named appellant, Ira W. Collins, now plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Court of Criminal Appeals of the State of Texas.

Now, Therefore, the condition of this obligation is such that, if the above named plaintiff in error, Ira W. Collins, shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void, otherwise, to remain in full force and effect.

IRA W. COLLINS, *Principal,*
By MILLARD PATTERSON,
His Att'y & Ag't.
THE UNITED STATES FIDELITY & GUARANTY CO.,
[SEAL.] By WM. H. STACY, *Att'y in Fact, and*
JNO. W. ROBBINS, *Att'y in Fact.*

52 The foregoing bond approved this the 8th day of November, 1909. W. L. Davidson, Presiding Judge Court of Criminal Appeals, at Austin, Texas.

(Endorsed:) No. 60/4209. Ira W. Collins v. The State of Texas. Writ of Error Bond. Filed in Court of Criminal Appeals, at Austin, Texas. November 8, 1909. E. P. Smith, Clerk.

Assignment of Errors.

In the Court of Criminal Appeals, at Austin, Texas.

No. 60/4209.

IRA W. COLLINS, Appellant,
v.
THE STATE OF TEXAS, Appellee.

Ex parte IRA W. COLLINS.

Habeas Corpus.

And now before the Justices of the Supreme Court of the United States of America, at the Capitol, in the city of Washington, come Ira W. Collins (the plaintiff and relator in the above styled cause) by his counsel, and makes the following assignments of error, which he avers occurred in the final order and judgment of the said Court of Criminal Appeals at Austin, Texas, rendered in said cause, above styled and numbered, to-wit:

I.

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 6th Assignment of Error, which was urged upon his appeal in said cause, the said 6th Assignment of Error, being, as follows:

The relator, Ira W. Collins (plaintiff in error herein) having established himself in the practice of Osteopathy in the County of El Paso, Texas, prior to the passage of the Act of 1907, to-wit: Chapter 123 of the Acts of 1907 (30th Legislature of Texas) and being engaged in the business of said profession at said time, under a diploma from the American School of Osteopathy, at Kirksville, Mo., and his business, or profession, before that time having
53 been recognized by the Legislature of Texas as not being the practice of medicine, the application of said Chapter 123 to him, under the facts of this case, and the requiring him under said Chapter 123 to obtain either the verification license mentioned in Section 6 of said Act or to require him to obtain a license to practice medicine as provided in sections 7 & 9 of said Act was in direct violation of the 14th Amendment to the Constitution of the United States which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and the court erred in not discharging the relator for said reason.

II.

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 8th assignment of error, which was urged upon his appeal, and which was as follows:

"Said Chapter 123 of the Acts of the Thirtieth Legislature of Texas, if it applies to relator, Ira W. Collins, (the plaintiff in error) under the facts of this case, as an osteopath, or to any osteopath, is violative of the 14th Amendment to the Constitution of the United States, in this: it discriminates in favor of nurses who practice only nursing, it being well known that such nurses treat minor ailments by the use of medicine, and sometimes without the use of medicines, and charge therefor money or other compensation, and it discriminates in favor of masseurs who, in their particular sphere of labor, treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body, and charge therefor money and other compensation, and discriminates in favor of druggists, who prescribe remedies and charge therefor, and said Court of Criminal Appeals erred in not discharging relator, Ira W. Collins, from custody upon the final hearing of this cause, for this reason."

54 III.

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 10th assignment of error, which was urged in said Court, upon his said appeal, and which was as follows:

"If said Chapter 123 of the Acts of 1907 (Thirtieth Legislature of Texas) applies to an osteopath who practices only as such, or applies to relator, Ira W. Collins (the plaintiff in error) under the facts of this case, then section 6, Chapter 123 of the Acts of the 30th Legislature of Texas, Regular Session, 1907, discriminates against the relator in providing for the issuance of a verification license to legal practitioners of medicine who were practicing under the provisions of previous laws, or under diplomas of reputable and legal colleges of medicine, the relator, Ira W. Collins, having been at the time said act was passed, and having been ever since it was passed, a practitioner of osteopathy. There being no provision in said law for the issuance of a verification license to relator, or other osteopaths practicing osteopathy in the State of Texas, on account of such discrimination said Section 6 of Chapter 123 is violative of the 14th Amendment to the Constitution of the United States, and for this reason the said Court of Criminal Appeals erred in not holding said act and said section void, and in not discharging the relator from further custody upon the final hearing -hereof."

IV.

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 12th Assignment of Error, which was urged upon his appeal, and which was as follows:

"If subdivision 2 of Section 13 of Chapter 123 of the Acts of 1907

(30th Legislature of Texas) is to be held applicable to relator, Ira W. Collins (the plaintiff in error herein) under the facts of this case, or any one simply practicing osteopathy, then said Chapter 123 is in violation of the 14th Amendment to the Constitution of the
55 United States in discriminating against an osteopath, and relator, Ira W. Collins, in requiring that he should have a diploma from a bona fide medical school before he can present himself for examination before the Medical Board of Examiners for a license to practice, and in requiring him to accept a license to practice medicine, and the court erred in not holding said subdivision void, and in not discharging the relator from custody upon final hearing of this cause."

V.

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 13th Assignment of Error, which was urged upon his said appeal, and which was as follows:

"If relator, Ira W. Collins (plaintiff in error) practicing osteopathy as shown by the evidence, was practicing medicine at the time said Chapter 123 went into effect, on account of the fact that he treated some diseases by the principles of osteopathy, and osteopathy was at the time said Chapter 123 went into effect, a school of medicine, and is now a school of medicine, to require plaintiff to obtain a diploma from a medical college as defined in said Act, and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practice osteopathy would be a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, and would be in contravention of the 14th Amendment to the Constitution of the United States for this reason, and for this reason the trial court erred in not discharging the relator upon the final hearing of this case, and erred in remanding him to the custody of the sheriff."

Each and all of the points presented in the foregoing assignments of error were urged and presented in the trial court by the plaintiff in error herein (the relator in the trial court and the appellant in the Court of Criminal Appeals at Austin, Texas) as shown by the bill of exceptions filed in the trial court, to-wit: the county court of El Paso County, Texas, on March 27th, 1909, and each and
56 all of the points urged in said assignment of error were made and urged in the said Court of Criminal Appeals at Austin, Texas, as shown by the assignments of error filed in said trial court on May 7th, 1909, and as shown by the transcript and record in said Court of Criminal Appeals.

Said Ira W. Collins (plaintiff in error herein) prays that a writ of error from the Supreme Court of the United States may issue to the said Court of Criminal Appeals of the State of Texas, at Austin, Texas, and further prays that the Supreme Court of the United States will reverse the said final order and judgment of said Court of Criminal Appeals of the State of Texas, and that the said plaintiff in

error may have judgment restoring him to his liberty, and he prays for all such other and further relief as may be proper and just.

Dated this the 8th day of November, 1909.

MILLARD PATTERSON,
Attorney for Ira W. Collins, Plaintiff in Error.

(Endorsed:) No. 60/4209. Ira W. Collins, plaintiff in error vs. The State of Texas, Defendant in error. Assignment of Errors. Filed in Court of Criminal Appeals, at Austin, Texas, November 8th, 1909. E. P. Smith, Clerk.

57 *Clerk's Certificate.*

THE STATE OF TEXAS:

I, E. P. Smith, Clerk of the Court of Criminal Appeals of the State of Texas, at Austin, do hereby certify that the foregoing fifty six pages contain a true and correct copy of the proceedings had in the Court of Criminal Appeals of the State of Texas, in cause No. 60/4029, Styled Ex parte Ira W. Collins, from El Paso County, as the same now appear on record and on file in my office.

And I further certify that the original writ of error bond was filed in my office on November 8, 1909; and that the original writ of error was filed therein on November 8, 1909, together with a copy for the defendant in error.

And in obedience to the commands of the within Writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

Witness my hand and seal of the Court of Criminal Appeals of Texas, at Austin, Texas, this the eighteenth day of November, A. D. 1909.

[Seal Court of Criminal Appeals of Texas.]

E. P. SMITH,
Clerk of the Court of Criminal Appeals of the State of Texas.

58 UNITED STATES OF AMERICA, *ss:*

To the State of Texas (represented by R. V. Davidson, the Attorney General of the State of Texas, at Austin, Texas):

You are hereby cited and admonished to be and appear at the *the* Supreme Court of the United States, at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Criminal Appeals of the State of Texas, at Austin, Texas, wherein Ira W. Collins is plaintiff in error, and said State of Texas is defendant in error, to show cause, if any there be, why the judgment rendered against the said Ira W. Collins, plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Said writ of error has been sued out in case 4209 on the docket of said Court of Criminal Appeals at Austin, Texas, in which Ira W. Collins was appellant and the State of Texas was appellee, and a judgment was rendered in said cause in said Court of Criminal Appeals at Austin, Texas, refusing to discharge him from custody upon writ of habeas corpus.

Witness, the Honorable W. L. Davidson, presiding Judge of the Court of Criminal Appeals of the State of Texas, at Austin, Texas, this the 8th day of Nov., A. D. 1909.

W. L. DAVIDSON,
Presiding Judge Court of Criminal Appeals of the State of Texas, at Austin, Texas.

[Seal Court of Criminal Appeals of Texas.]

Attest:
E. P. SMITH,
Clerk Court of Criminal Appeals.

A copy of the within citation was received and service accepted this 8th day of November, 1909, at the office of the Attorney General of the State of Texas.

R. V. DAVIDSON,
Attorney General,
By F. J. McCORD,
Assistant Attorney General.

[The seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

Attest 11/8/09:
D. H. HART,
Clerk U. S. Cir. Ct.,
W. D. T., at Austin, Tex.
By A. B. COFFEE, *Deputy.*

[Endorsed:] 60/4209. Ira W. Collins vs. The State of Texas. Original citation in error. Filed in Court of Criminal Appeals at Austin, Texas, November 8, 1909. E. P. Smith, Clerk.

59 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Criminal Appeals of the State of Texas at Austin, Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Criminal Appeals before you, or some of you, between Ira W. Collins, Appellant vs. The State of Texas (Ex parte Ira W. Collins Habeas Corpus) No. 4209 on the docket of said Court in which said cause judgment was rendered on June 19th, 1909, by said Court of Criminal Appeals, refusing to discharge him on habeas corpus from custody—his motion for a rehearing having been overruled by said Court on Oct. 6th,

1909, a manifest error hath happened, to the great damage of the said Ira W. Collins who was appellant in said cause, and who has sued out a writ of error to said Court of Criminal Appeals, from the Supreme Court of the United States—Said Ira W. Collins claiming that he is deprived of his liberty under Chap. 123 of the Acts of the 30th Legislature of Texas, in contravention of the 14th Amendment to the Constitution of the United States as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States at Washington, together with this writ, so that you have the same at Washington, D. C., within thirty days from the date hereof, in the said Supreme Court of the United States, to be then and there held, and the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8 day of Nov. in the year of our Lord one thousand nine hundred and nine.

[Seal of the U. S. Circuit Court, Western Dist. Texas, Austin.]

D. H. HART,
Clerk of the U. S. Circuit Court, Western Dist. of Texas, at Austin, Texas.
By A. B. COFFEE, *Deputy.*

Allowed this the Eighth day of Nov., 1909.
W. L. DAVIDSON,
Presiding Judge of the Court of Criminal Appeals of Texas, at Austin, Texas.

[Endorsed:] 60/4209. Ira W. Collins vs. The State of Texas. Original writ of error. Filed in Court of Criminal Appeals at Austin, Texas, November 8, 1909. E. P. Smith, Clerk.

[Endorsed:] Transcript from Court of Criminal Appeals of the State of Texas. Ira W. Collins, Plaintiff in Error, vs. The State of Texas, Defendant in Error.

Endorsed on cover: File No. 21,914. Texas Court of Criminal Appeals. Term No. 165. Ira W. Collins, plaintiff in error, vs. The State of Texas. Filed November 29th, 1909. File No. 21,914.

In Supreme Court of the United States

OCTOBER TERM, 1911

No. 165

IRA W. COLLINS, *Plaintiff in Error*

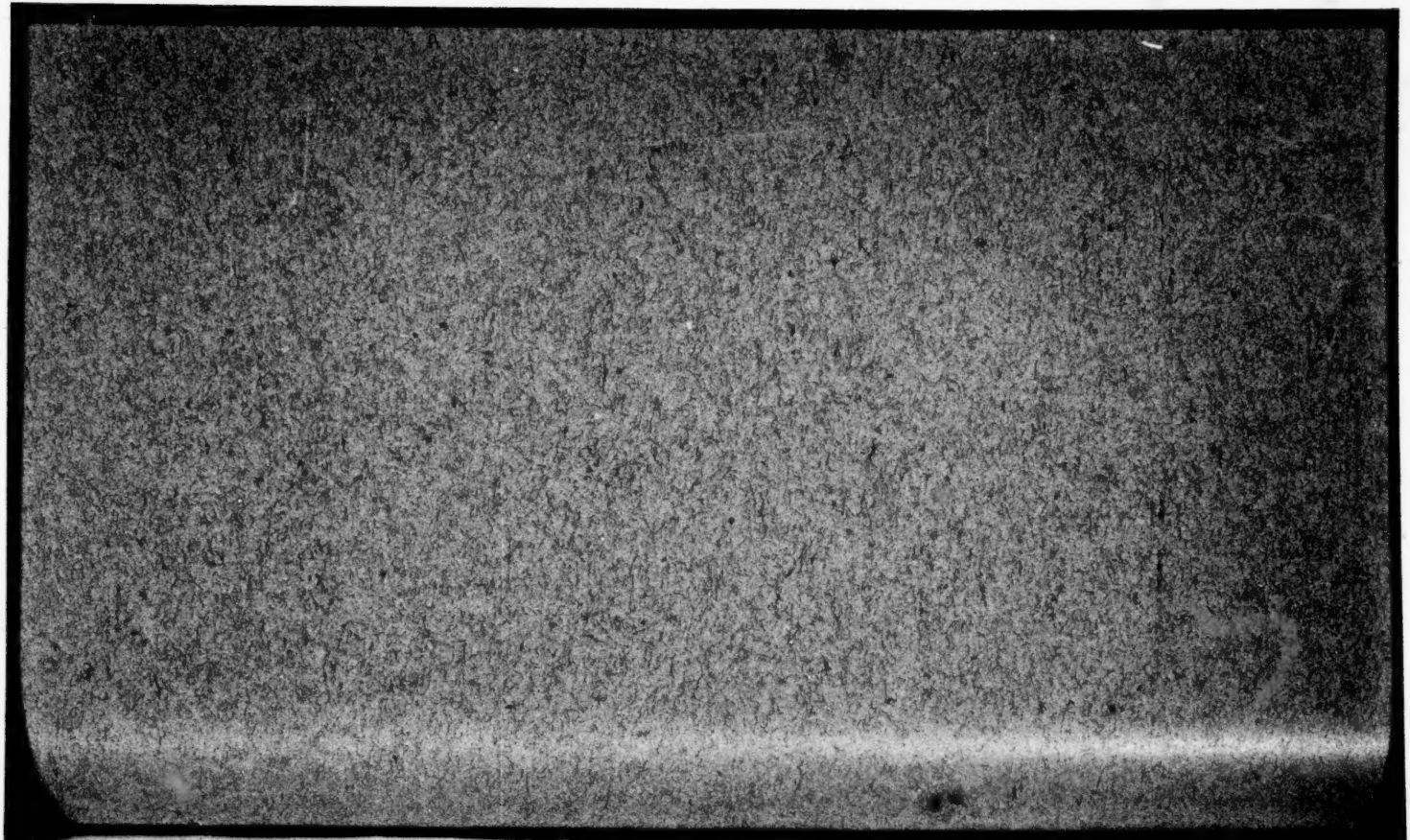
vs.

THE STATE OF TEXAS, *Defendant in Error.*

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR

MILLARD PATTERSON,
JO. F. WOODSON,
Attorneys for Ira W. Collins,
Plaintiff in Error.



In Supreme Court of the United States

OCTOBER TERM, 1911

No. 165

IRA W. COLLINS,

Plaintiff in Error.

vs.

THE STATE OF TEXAS,

Defendants in Error.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

STATEMENT OF THE CASE

Ira W. Collins, the plaintiff in error, sued out a writ of habeas corpus on March 5, 1909, in the County Court of El Paso county, Texas, alleging that he was illegally restrained of his liberty by the sheriff of said county under a warrant or capias charging him with the offense of unlawfully practicing medicine. The sheriff's return upon the writ of habeas corpus was to the effect that he held the relator under said warrant, the same being based upon the complaint and information annexed to his return, copies of said complaint and information being attached to and made a part of the return (See Pr. Trans. p. 1-6).

In the complaint and information it is alleged that the relator, Ira W. Collins, on September 2, 1908, unlawfully practiced medicine in that he treated Julia Ballinger for hay fever, for pay, by means of a system called osteopathy, which treatment consisted in "manipulating scientifically the limbs, muscles, ligaments and bones of the said Julia Ballinger," etc., without having a license to practice medicine (See Information, Pr. Tr. p. 4-5) in violation of Chap. 123 of the laws of Texas 1907. Upon the final hearing in said County Court on March 27, 1909, the relator was by the judgment of the court remanded to the custody of the Sheriff of El Paso County, and the writ of habeas corpus denied, and to this judgment of the County Court Ira W. Collins objected and excepted and gave notice of appeal and perfected his appeal to the Court of Criminal Appeals of Texas. (Pr. Trans. p. 6-7.) His bill of exceptions was filed March 27, 1909, (Pr. Tr. p. 12-15) the Statement of Facts was prepared and filed April 14, 1909 (Pr. Tr. p. 7-11), and he filed assignments of error in said County Court on May 27, 1909 (Pr. Tr. p. 18-21).

Said cause came on for hearing on said appeal in June, 1909, and the judgment of said County Court was affirmed by the Court of Criminal Appeals at Austin, Texas, June 19, 1909. (Pr. Tr. p. 23) and written opinion filed (Pr. Tr. pp. 24-26). Motion for rehearing was filed in said Court of Criminal Appeals June 30, 1909 (Pr. Tr. p. 26-33), which was overruled on October 6, 1909 (Pr. Tr. p. 33).

The appellant and relator (now plaintiff in error) filed his petition for a writ of error to the said Court of Criminal Appeals November 8, 1909, which was granted by the pre-

siding judge of said court, and the amount of his bond fixed at $300. (Pr. Tr. pp. 34-35.) A writ of error bond in the amount mentioned was filed on November 8, 1909, duly approved (Pr. Tr. p. 35). On the same date, November 8, 1909, the appellant and relator (now the plaintiff in error) *filed his assignments of error which he avers occurred in the final order and judgment of the said Court of Criminal Appeals,* said assignments of error being five in number.

Each and all of the points which are here presented in the five assignments of error which follow (setting up that Chapter 123 of the laws of Texas, 1907, is in violation of the United States Constitution) urged in this brief, in order, were urged and presented by the plaintiff in error herein in said County Court of El Paso County, Texas, and in said Court of Criminal Appeals at Austin, Texas, as shown by said bill of exceptions filed in the trial court on March 27, 1909, and as shown by the assignments of error urged in said Court of Criminal Appeals (Pr. Tr. pp. 36-38).

A writ of error having been granted, as aforesaid, citation was duly issued on November 8, 1909 (Pr. Tr. pp. 39-40), and service of same accepted by the Attorney General of Texas on same date (Pr. Tr. pp. 39-40), and the writ of error, which was allowed, duly issued on the same date (Pr. Tr. pp. 40-41).

To reverse the judgment of the said Court of Criminal Appeals (as well as the trial court) and to obtain the judgment of the Honorable Supreme Court of the United States restoring him to his liberty this writ of error is prosecuted.

All of the essential facts are shown under our first assignment of error.

FIRST ASSIGNMENT OR SPECIFICATION OF ERROR

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 6th Assignment of Error, which was urged upon his appeal in said cause, the said 6th Assignment of Error being as follows:

The relator, Ira W. Collins, (plaintiff in error herein) having established himself in the practice of Osteopathy in the County of El Paso, Texas, prior to the passage of the Act of 1907, to-wit: Chapter 123 of the Acts of 1907 (30th Legislature of Texas) and being engaged in the business of said profession at said time, under a diploma from the American School of Osteopathy, at Kirksville, Mo., and his business, or profession, before that time having been recognized by the Legislature of Texas as not being the practice of medicine, the application of said Chapter 123 to him, under the facts of this case, and the requiring him under said Chapter 123 to obtain either the verification license mentioned in Section 6 of said Act or to require him to obtain a license to practice medicine as provided in sections 7 and 9 of said Act was in direct violation of the 14th Amendment to the Constitution of the United States, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law," and the court erred in not discharging the relator for said reason.

Proposition 1. Relator, Ira W. Collins, had the right and privilege as a citizen of the United States to follow the calling for which he had prepared himself at the time this Chap-

ter 123 of the Acts of 1907 was passed, and we maintain that to apply the act to him would be in direct violation of the 14th Amendment to the Constitution of the United States.

Proposition 2. Under the Fourteenth Amendment of the United States Constitution the Legislature of Texas would have no right to arbitrarily declare that relator, an Osteopath, not using medicines in any way, in manipulating a patient for hay fever was a practitioner of medicine and should obtain a license to practice medicine, as provided in said act (Chap. 123 of Acts 1907) and that to do such an act without such license was a crime.

Proposition 3. Chapter 123 of the Acts of 1907 (Texas) in providing that an osteopath who does not propose or pretend to use medicine in any way in his treatment of a disease or disorder shall graduate from and have a diploma of a medical college and stand an examination in the scientific branches of medicine is violative of said Fourteenth Amendment to the United States Constititution, and the fundamental principles of the government in that it is arbitrary, unreasonable and oppressive and denies the right of personal opinion and conduct even where the rights of others are not involved, and restricts the free choice of a citizen in a matter concerning only himself and not the people at large.

Proposition 4. The Legislature having declared that any kind of treatment for pay is the practice of medicine, said Chapter 123 in declaring that no person shall be allowed to treat any disease, disorder or injury however trivial, by any method for pay, without having a license to practice medicine based upon a diploma and an examination on the scientific branches of medicine is arbitrary, unreasonable and oppres-

sive and is an unwarranted interference with the rights of competent and honorable persons who treat diseases, disorders or injuries without the knowledge or use of medicines and is also an unwarranted interference with the rights of worthy, competent and honorable persons who may desire to be so treated, and for this reason said act should be held void. The Legislature of Texas could have no right under the Constitution of the United States to so restrict the free choice of a citizen in a matter concerning only himself and not the people at large.

Proposition 5. Said Chapter 123 in prohibiting any person from treating any disease or disorder of any kind or nature by any system or method for pay unless such person has a license to practice medicine (such being the construction of said act and particularly of subdivision 2 of section 13 of said act by the Court of Criminal Appeals of Texas) is void, as the effect of the same is to create a monopoly in the art of healing among those who are graduates of certain medical colleges.

Proposition 6. As the complaint and information upon which the relator below was prosecuted simply charged, and the evidence showed simply, that the relator below treated Julia Ballinger for hay fever, for pay, by kneading and rubbing, the relator should have been discharged, as the Legislature of Texas would have no authority to enact a law making such an act a crime or misdemeanor, if charged for, or to declare that such an act could only be performed for pay by one having a license to practice medicine, or to enact a law making the criminality of such an act depend upon whether the operator received pay for his services, or to enact such a

law confining the treatment of all disorders of whatever nature, however insignificant, to those who might have a license to practice medicine.

Proposition 7. When the Act of 1907, Chap. 123, was passed, the relator, Ira W. Collins, was not a legal practitioner of medicine in Texas but he was engaged in a lawful business. *The previous Act of 1901 had declared that the practice of osteopathy was not the practice of medicine*, and he was not practicing medicine "under the provisions of any previous law." He was not practicing under a diploma from a reputable legal college of medicine and he did not belong to the class of physicians who were exempted under the Act of 1901; that is, those who were practicing medicine in the State of Texas prior to January 1st, 1885; and he had no right to obtain a verification license under section 6 of said Chapter 123 of the Acts of 1907; as this section 6 of said Chapter 123 only provides for the issuance of a verification license to practitioners of medicine under previous laws, or under diplomas of a reputable and legal college of medicine, or those who were *practicing medicine* under previous exemptions, and to now require the relator, Collins, who was already established in the practice of osteopathy to show that he was a graduate of a bona fide reputable medical school, under the provisions of section 7 of Chapter 123, and to require him, under the provisions of section 9, to stand an examination in the *scientific branches of medicine*, he having never studied or pretended to study the scientific branches of medicine, would be to deprive him of his property without due process of the law of the land, and deny to him the equal protection of the law.

STATEMENT OF THE EVIDENCE

The following facts were admitted by counsel for both parties in open court:

That the relator, Ira W. Collins, is a citizen of the United States and has been a resident of El Paso County, Texas, and a citizen of the city of El Paso, Texas, for about six years, practicing in said city of El Paso during all of said time as a doctor of Osteopathy; that prior to his coming to the city of El Paso, in the year 1903, he graduated as a doctor of Osteopathy after a full two year's course of instruction at the American School of Osteopathy, at Kirksville, Missouri, and received in the Spring of 1903 a diploma which he now has, and ever since has had, from said American School of Osteopathy; that he, relator, and the other graduates of said school do not use and have never used in their practice in the treatment of disease or sickness any drug or medicine, but their treatment consists and at all times has consisted in manipulating scientifically, as taught in said school of Osteopathy, the limbs, muscles, ligaments and bones pressing on the blood supply, so that nature may have free action and the natural blood supply be restored and the diseased condition thus removed.

It was further admitted that said American School of Osteopathy was chartered in the State of Missouri in 1892 and 1894 by a regular charter under which the said school has since been operating.

It was further admitted that said American School of Osteopathy does not teach and has never taught *therapeutics or materia medica*, its theory being that a large number of ailments are due to irregular nerve action, and that by stim-

ulating or ~~repressing~~ relieving the nerve centers by manipulation, nature herself is enabled to right the evil—it administers no drugs.

Said school of osteopathy does not teach and has never taught either the properties, nature or effects of drugs or medicines, or how to compound or administer them, or for what maladies they are to be used; but said school teaches and always has taught its students and its graduates to discard the use of drugs and medicines.

It was further admitted that there are now eight well equipped colleges of Osteopathy in the United States, besides the original school at Kirksville; and that more than 5000 doctors of Osteopathy are now practicing in the United States and foreign countries; and osteopathy as a means of healing some human ailments has been recognized by the legislatures of the majority of the States in the Union; and there was in the month of April, 1907, and at the time Chapter 123 of the Acts of 1907, 30th Legislature of Texas, regular session, was passed, and at the time same was designed to go into effect, several hundred practitioners of osteopathy in the State of Texas.

It was further admitted that at the time said Chapter 123 of the laws of the 30th Legislature, regular session, was passed, in April, 1907, the relator, Ira W. Collins, had already established himself in the city of El Paso, Texas, as a practitioner of Osteopathy, and had expended the sum of $5,000.00 in improving and fitting up his place of business with conveniences, etc., suitable for his business in said city, which place of business, fitted up at said expense, he now occupies and has ever since occupied; and that ever

since 1903 he has followed and now follows said profession of Osteopathy for a living; and that his annual income and practice as an Osteopath at the time said law was passed, in the year 1907, was and ever since has been and now is of the gross annual value of more than $10,000, and the net value of at least $5,000.00.

It was further admitted that said Ira W. Collins, on or about the 2d day of September, 1908, being then and there a resident of the county of El Paso, Texas, did then and there treat Julia Ballinger, a human being, in said county of El Paso, Texas, for hay fever, said hay fever being a physical disease and disorder; and did charge said Julia Ballinger therefor money, said treatment being given by the said Ira W. Collins by means of said system of Osteopathy, and said treatment then and there consisting in manipulating scientifically the limbs, muscles, ligaments and bones and nerves of the said Julia Ballinger, which pressed upon the nerves of the blood supply, etc., and that in the treatment of said Julia Ballinger the said Ira W. Collins used no medicines or drugs whatsoever.

That relator had not registered any authority from the Board of Medical Examiners of the State of Texas at the time he so treated the woman mentioned (Pr. Trans. pp. 8-9).

Dr. Charles T. Race testified that he is a physician and surgeon, a graduate of Tulane Medical University of Louisiana, now known as the medical department of the University of Louisiana; that he graduated about 30 years ago as a physician and surgeon, and has been practicing medicine and surgery every since, and has lived and practiced in El Paso, Texas, for more than 20 years; that he is an M. D.,

which means Doctor of Medicine, that he belongs to the Allopathic School of medicine; that he knows what the scientific branches of medicine are; that they are anatomy, physiology, chemistry, therapeutics, materia medica, practice of medicine, surgery, hygiene, obstetrics and diseases of women and children; "these branches or studies lie at the very foundation of the practice of medicine." That he could not conceive of the scientific branches of medicine as not including therapeutics, materia medica and the practice of medicine; that he was acquainted with and knew what is a reputable medical school. "The basic studies that are taught in all reputable medical schools are the basic branches mentioned, to-wit: anatomy, physiology, chemistry, therapeutics, materia medica, practice of medicine, surgery, hygiene, obstetrics and diseases of women and children." That he could not conceive of a reputable medical school that did not teach the branches mentioned. "I do not consider the practice of Osteopathy as being the practice of medicine." (Pr. Tr. 7-9.)

We here present at the bottom the statute in full (Chap. 123 Trans. 30th Leg. Tex. 1907) for an alleged violation of which relator is held.

Be it enacted by the Legislature of the State of Texas:

Sec. 1. That a board, to be known as the Board of Medical Examiners for the State of Texas, is hereby established. Said board shall consist of eleven men learned in medicine, legal and active practitioners in the State of Texas, who shall have resided and practiced medicine in this State under a diploma from a legal and reputable college of medicine of the school to which said practitioner shall belong for more than three years prior to their appointment, and no one school shall have a majority representation on said board. Said board shall be appointed by the Governor of this State within ninety days after this act shall become effective and biennally thereafter within ninety days after his inauguration and the term of office of its members shall be two years, or until their successors shall be appointed and qualified. No member of said board shall be a stockholder of or a member of the faculty or a board of trustees of any medical school. Vacancies occurring in the board shall be filled by the Governor. The word "medicine" as

ARGUMENT AND AUTHORITIES

This is not a prosecution for publicly professing to be a *physician* or *surgeon* and treating a disease, under the first subdivision of section 13 of Chapter 123 of the Acts of 1907, but is a prosecution under the second subdivision of said section 13, the complaint and information filed charging simply that the relator did the one single act of treating Julia Ballinger for the disease called hay fever by manipulation, etc., according to the system called osteopathy, for pay, etc. (See Information, Pr. Trans. p. 8.)

Said second subdivision of section 13 declares that "To treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by *any system or method* or to effect cures thereof and *charge therefor* directly or indirectly money or other compensation" is to prac-

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used in this section shall have the same meaning and scope as given to it in Section 13 of this act.

Sec. 2. The members of said board shall qualify by taking the oath of office before a notary public or other officer empowered to administer oaths in the county in which each shall respectively reside. At the first meeting of said board after each biennial appointment the board shall elect a president, vice-president and secretary-treasurer. Six members shall constitute a quorum. Regular meetings shall be held at least twice a year, at such times and places as shall be deemed most convenient for applicants. Due notice of such meetings shall be given by publication in such papers as may be selected by the board. Special meetings may be held upon a call of three members of the board. The board may prescribe rules, regulations and by-laws, in harmony with the provisions of this act, for its own proceedings and government for the examination of applicants for the practice of medicine and obstetrics. Said board, or any member, shall have power to administer oaths for all purposes required in the discharge of its duties, and to adopt a seal to be affixed to all of its official documents.

Sec. 3. The Board of Examiners shall preserve a record of its proceedings in a book kept for that purpose, showing name, age, place and duration of residence of each applicant, the time spent in medical study in respective medical schools, and the year and school from which degrees were granted; said register shall also show whether applicants were rejected or licensed, and shall be prima facie evidence of all matters contained therein. The secretary of the board shall, on March 1 of each year, transmit an official copy of said register to the Secretary of State for permanent record, certified copy of which, with hand and seal of the secretary

tice medicine, and the whole chapter makes it a criminal offense for a person to do any of the things mentioned in this subdivision 2 unless he has registered in the District Clerk's office, etc., his authority "to practice medicine" from the Board of Medical Examiners of Texas, such authority to consist either of the "verification License" mentioned in section 6, which was to be obtained in one year, or the license "to practice medicine" mentioned in section ~~13~~ 9. This definition of the "practice of medicine" is so broad that it includes every person who offers to relieve any human ailment, and the statute says to such a person you cannot relieve or offer to relieve human suffering or any human ailment *for pay* unless you are a graduate of a bona fide medical college, and pass an examination in the scientific branches of medicine.

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of said board, or Secretary of State, shall be admitted in evidence in all courts.

Sec. 4. From and after the passage of this act it shall be unlawful for any one to practice medicine in any of its branches upon human beings within the limits of this State who has not registered in the district clerk's office of the county in which he resides, his authority for so practicing, as herein prescribed, together with his age, post office address, place of birth, school of practice to which he professes to belong, subscribed and verified by oath, which, if wilfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be indorsed by the district clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate.

Sec. 5. It is hereby made the duty of the district clerk of each county in this State to purchase a book of suitable size, to be known as the "Medical Register" of such county, and set apart one full page for the registration of each physician, and to record in the same the name and record of each practitioner who presents a certificate from the State Board of Examiners, issued under this act. The clerk shall receive the sum of one dollar from each physician so registered, which shall be his full compensation for all duties required under this act. When any physician shall die or remove from the county, or have his license revoked, it shall be the duty of said clerk to make a note of facts at the bottom of the page as closing the record. On the first day of January in each year said clerk shall, on request of the board, certify to the office

We call attention succinctly in this connection to other essential features of the act.

Section 1 of the act mentioned provides "that the Board shall consist of eleven men learned in *medicine* * * * who shall have resided and practiced *medicine* in this state under a diploma from a legal and reputable college of *medicine* of the school to which said practitioner shall belong."

Section 3 of the act declares that the Board of Examiners shall keep a record showing the name, age and duration of residence of each applicant, time spent in medical *study* in respective *medical* schools, and the year and school from which degrees were granted.

Section 4 declares that "it shall be unlawful for any one to practice *medicine* in any of its branches, etc., unless he has

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of the State Board of Medical Examiners a correct list of the physicians then registered in the county, together with such other information as said board may require. Any district clerk, upon conviction of knowingly violating any of the provisions of this act, shall be fined not more than fifty dollars. A copy from the medical register pertaining to any person certified to by said clerk under the seal of said court; also a certificate issued by said officer certifying that any person named has or has not registered in said office as required by his act, shall be admitted as evidence in all trial courts.

Sec. 6. Within one year after the passage of this act all legal practitioners of medicine in this State, who, practicing under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State, shall present to the Board of Medical Examiners for the State of Texas documents, or legally certified transcripts of documents, sufficient to establish the existence and validity of such diplomas or of the valid and existing license heretofore issued by previous examining boards of this State, or exemption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. Such verification license shall be issued for a fee of fifty cents to all practitioners who have not already received a license from the State Board of Medical Examiners of this State. It is especially provided that those whose claims to State licenses rest upon diplomas from medical colleges recorded from January 1, 1891, to July 9, 1901, shall present to the State Board of Medical Examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall

registered his authority in the District Clerk's office for so practicing."

Section 5 provides for the keeping of a medical register "one full page of which shall be set apart for the registration of each *physician*."

Section 6 provides that all legal practitioners of *medicine*, practicing under the provisions of previous laws, and under diplomas of reputable and *legal colleges of medicine*, who had not already received license from the State Medical Board, should present to the Board of Medical Examiners documents or legally certified transcripts of documents sufficient to establish the existence and validity of such diplomas or of the valid and existing license theretofore issued by previous examining boards, or exemption existing under any

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be decided by the Board of Medical Examiners before they are entitled to a certificate from said board. This board may, at its discretion, arrange for reciprocity in license with the authorities of other States and Territories having requirements equal to those established by this act. License may be granted applicants for license under such reciprocity on payment of twenty dollars.

Sec. 7. All applicants for license to practice medicine in this State who are not licensed under the provisions of the previous section must successfully pass an examination before the Board of Medical Examiners established by this act. Applicants to be eligible for examination must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character and graduates of bona fide reputable medical schools. Such schools shall be considered reputable within the meaning of this act whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each. Application for examination must be made in writing under affidavit to the secretary of the board, on forms prepared by the board, accompanied by a fee of fifteen dollars; except when an applicant desires to practice obstetrics alone the fee shall be five dollars. Such applicants shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the State of Texas, upon proper application, shall be examined by the board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or hold themselves out to the pub-

law, and should receive from said board a verification license.

Section 7 provides that those who shall apply for licenses to practice (not having the verification license mentioned in section 6) must successfully pass an examination before the medical examiners established by this act of 1907, and they cannot present themselves as applicants unless they are "graduates of bona fide, reputable medical schools." Reputable schools being defined to be "those whose entrance requirements and courses of instruction are as high as those adopted by the better class of *medical schools* of the United States, whose course of instructions shall embrace not less than four terms of five months each."

Even though the applicant may be a graduate of a bona fide reputable medical school, still he is required by section

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lic as so practicing. In case any applicant, because of failure to pass examintion be refused a license, he or she shall, after one year, be permitted to take a second examination without an additional fee.

Sec. 8. The fund realized from the aforesaid fees shall be applied first to the payment of necessary expenses of the Board of Examiners; any remaining funds shall be applied by the order of the board to compensating members of the board in proportion to their labors.

Sec. 9. All examinations shall be conducted in writing and in such manner as shall be entirely fair and impartial to all individuals and every school of medicine, the applicants being known by numbers, without names or other method of identification on examination papers by which members of the board may be able to identify such papers, until after the applicants have been granted licenses or rejected. Examinations shall be conducted on the scientific branches of medicine only, and shall include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. Upon satisfactory examination under the rules of the board, applicants shall be granted licenses to practice medicine. All questions and answers, with grades attached, shall be preserved for one year. All applicants examined at the same time shall be given identical questions in each of the above branches. All certificates shall be attested by the seal and signed by all members of the board, or a quorum thereof.

Sec. 10. Nothing in this act shall be (so) construed as to discriminate against any particular school or system of medical practice. This act shall not apply to dentists legally qualified and

9 to pass an examination before the Board of Medical Examiners, and section 9 requires that "examinations shall be conducted on the *scientific branches of medicine only*, and shall include anatomy, physiology," and other subjects mentioned. The only license provided for in the whole act, as shown by said section 9, is a license "*to practice medicine.*"

Section 10 provides nothing in the act shall be construed as to discriminate against any particular school or system of "*medical practice.*"

The first subdivision of section 13 declares that one who shall *publicly profess to be a physician or surgeon* and shall treat or offer to treat any disease or disorder, etc., by any system or method, or to effect cures thereof, shall be regarded as practicing medicine.

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registered under the laws of this State who confine their practice strictly to dentistry; nor to nurses who practice only nursing; nor to masseurs, in their particular sphere of labor, who publicly represent themselves as such; nor to commissioned or contract surgeons of the United States Army, Navy or Public Health and Marine Hospital Service, in the performance of their duties, but such shall not engage in private practice without license from the Board of Medical Examiners; nor to legally qualified physicians of other States called in consultation, but who do not open offices or appoint places in this State where patients may be met or called to see. This act shall be so construed as to apply to persons other than licensed druggists of this State not pretending to be physicians, who offer for sale on the streets or other public places remedies which they recommend for the cure of disease.

Sec. 11. The State Board of Medical Examiners may refuse to admit persons to its examinations or to issue the certificate provided for in this act for any of the following causes:

First. The presentation to the board of any license, certificate or diploma which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination.

Second. Conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring, or aiding or abetting the procuring of a criminal abortion.

Third. Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public; or for habits of intemperance or drug addiction calculated to endanger the lives of patients; provided, that any applicant who may be refused admittance to examination before said board shall have his right of action to have such issue tried in the District Court of the county in which some member of the board shall reside.

The act then declares (subdivision 2, section 13) that all persons who treat or offer to treat any disease or disorder by any method for pay are to be recognized as "practitioners of medicine." They are all put into one general group and the Legislature then by the same act declares that only those can practice or do any of the acts mentioned who have a license to practice medicine, and then limits such license to graduates of bona fide medical colleges, etc.

It will be noticed that the verification license mentioned in section 6 to be obtained in one year could only be obtained by "legal practitioners of medicine practicing under the provisions of previous laws" or "under diplomas of a reputable and legal college of medicine," and the license to practice medicine provided for in section 9 can only be obtained by one who is "a graduate of a bona fide reputable medical school as defined

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Sec. 12. The right therein to practice medicine in this State may be revoked by any court of competent jurisdiction, upon proof of the violation of the law in any respect in regard thereto, or for any cause for which the State Board of Medical Examiners is authorized to refuse to admit persons to its examinations as provided in Section 11 of this act; and it shall be the duty of the several district and county attorneys of this State to file and prosecute appropriate judicial proceedings in the name of the State, on request of any member of said board.

Sec. 13. Any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

(2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly money or other compensation.

Sec. 14. Any person practicing medicine in this State in violation of the provisions of this act shall, upon conviction thereof, be fined in any sum not less than fifty dollars nor more than five hundred dollars, and by imprisonment in the county jail for a term not exceeding six months, and each day of such violation shall constitute a separate offense, and in no such case shall the violator be entitled to recover anything for the services rendered.

Sec. 15. All certificates heretofore issued by any Board of Medical Examiners in this State under any former law shall be and continue in full force and effect for one year after this act shall take effect, but not afterward, and any person who may, when this

(See section 7), who must pass an examination before the Board of Medical Examiners of Texas" in the "scientific branches of medicine only." (See sec. 9.)

As shown by the admitted facts the relator had established himself in his business as an osteopath which was a recognized business or profession in the city of El Paso several years before the Act of 1907 was passed and had expended the sum of $5,000 in improving and fitting up his place of business, which place of business he now occupies and has ever since occupied, and ever since 1903 he has followed his profession of osteopathy for a living, and his annual gross income from his practice has been $10,000 per year, and is now of the net value of at least $5,000.

Up to the passage of this act, Chapter 123 of the Acts of 1907, the Legislature had declared in so many words that the practice of Osteopathy was not the practice of medicine. The last act prior to 1907 by which it was attempted to regulate the *practice of medicine* was Chapter 12 of the Acts of 1901 of the Legislature of Texas. Section 5 of this act of 1901 provided for the issuance of a license to those who then desired to commence the practice of medicine in the State. Section 8 of the

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act shall take effect, be practicing medicine within this State under the provisions of existing laws or under any exception contained therein, but without license, may, for one year thereafter, but not longer, continue in such practice, without license; and all such certificates and all such rights to practice medicine shall be in all respects subject to the provisions of this act as though issued or acquired under its provisions.

Sec. 16. The terms "physician" and "surgeon" as used in this act shall be construed as synoymous, and the terms "practitioners" and "practitioners of medicine" and "practice of medicine" as used in this act shall be construed to refer to and include physicians and surgeons.

Sec. 17. All laws and parts of law in conflict with the provisions of this act be and the same are hereby repealed. (Acts 1907, p. 224.)

Sec. 18. (Emergency Clause.)

Act of 1901 provided that those who had been practicing *medicine* in Texas prior to January 1st, 1885, should be altogether *exempt* from obtaining a license. (Second) that those who commenced to practice in the State after January 1st, 1885, who had complied with the laws regulating the practice of medicine, should be *exempt* from obtaining a certificate; and, further, that those who had diplomas recorded since January 1st, 1891, should show to the State Board of Medical Examiners that their diplomas had been issued by "*bona fide medical colleges of reputable standing*," and they should receive a certificate from said Board, and in section 13 of said act of 1901 it was declared that the provisions of the act "do not apply to persons treating diseases who do not prescribe or give drugs or medicine." Said section 13 of Chap. 12 of the acts of 1901 reads as follows:

"Sec. 13. Any person who shall practice medicine, surgery or mid-wifery in this State in violation of the provisions of this act shall be fined not less than fifty dollars nor more than five hundred dollars for each offense or by both fine and imprisonment not exceeding six months and it shall not be lawful for him or her to recover by action, suit, motion, or warrant, any compensation for services which may be claimed to have been rendered by him or her as such physician, surgeon, or midwife; provided, that *the provisions of this act do not apply to persons treating disease who do not prescribe or give drugs or medicine.*"

It may be argued that the relator, Ira W. Collins, might now present himself to the State Board of Medical Examiners to secure a license to practice, but the conditions prescribed by section 7 of Chapter 123 are, as we have suggested,

that the applicant must show in the first place that he is a "graduate of a bona fide reputable *medical* school," and such reputable school is defined in the same section as one whose "entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, and their course of instruction cannot embrace less than four terms of five months each;" and, furthermore, by section 9 of said Chapter 123 he is required to pass an examination "in the scientific branches of medicine," and the only license which the State Board of Medical Examiners is authorized to issue or grant by section 9 of said Chapter 123 is "a license to practice medicine."

In the case of Dent vs. the State of West Virginia, 129 U. S. 114-128 (U. S. Sup. Ct.) the court shows that the right to practice a profession or calling for which one has qualified himself and in which he has established himself is a property right, and that the Legislature would have no power by a statute to arbitrarily deprive him of that right. And the court says that the purpose of the constitutional provision referred to in the foregoing assignment is "*to exclude everything that is arbitrary and capricious in legislation affecting the rights of a citizen;* that *the framers of the constitution never meant to leave room for the play and action of purely personal and arbitrary power.*"

"It is undoubtedly the right of any citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. * * * The interest, or, as it is sometimes termed, the estate, acquired in them (vocations) is often of great value to the pos-

sessors, and cannot be arbitrarly taken away from them any more than their real or personal property can be thus taken."

Speaking of the last two clauses of the 14th Amendment the Supreme Court of the United States has often declared that they are plain restrictions upon the exercise of arbitrary and capricious power over persons and property when exercised by the State through any of its agencies. (See Ex parte Virginia, 100 U. S., p. 339; Yick Wo vs. Hopkins, 118 U. S.,356; Holden vs. Hardy, 169 U. S., 366.)

In Barbier vs. Connolly, 113 U. S., 27, it was said that by the 14th Amendment it was declared that "equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; * * * that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits of others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition."

We are not called upon in this case to discuss the question as to the Legislature's power to declare either directly or indirectly that certain alleged methods of healing should not be recognized and should not be tolerated as the practice of medicine. As we have shown by its very definition in the act of 1907 our Legislature has declared that to treat a man by the method of osteopathy is the practice of medicine, and it must be admitted that the Legislature might require one *practicing osteopathy* to obtain a license to practice *osteopathy.*

Now if an osteopath was in 1907 or is in fact a recognized healer of disease he ought not to be discriminated

against in the matter of obtaining a license to practice osteopathy.

In Nelson vs. the State Board of Health, 57 S. W., p. 504, the Court of Appeals of Kentucky says: "If the act under consideration applies to an osteopath, he can in no case practice his system in this state, for, however well qualified he may be, he cannot be examined for a license as a physician, and he *could not, without abandoning his practice as an osteopath*, obtain a diploma from a medical college. * * the term 'medical college' refers to those schools teaching medicine in its different branches. At such an institution an essential part of the instruction is in teaching the nature and effects of medicines, how to compound and administer them, and for what maladies they are to be used. * * * Without a knowledge of surgery or medical agencies, no person would be deemed equipped to practice medicine by any medical college, for these things lie at the base of the instruction given in such schools. * * A school which teaches neither surgery, materia medica nor therapeutics cannot be regarded as a medical college."

And in this same case the Court of Appeals of Kentucky declared that the terms "physician," "practice of medicine," "medical college," used in the act, have a well-defined popular meaning; a medical college being defined as one in which physicians are taught the nature and effects of medicine.

In State vs. Mylod (R. I.), 40 Atl., p. 753, the Supreme Court of Rhode Island says, referring to the case of a Christian Scientist: "The requirements of the statute, especially in the medical diploma, are such that the Christian Scientist could not comply with them, and to require compliance would

operate not as a discrimination only, but as a prohibition, and to grant a license to practice medicine to a Christian Scientist, upon examination, would be to defeat the purpose for which the law was enacted." The court says again: "If the practice of Christian Science is the practice of medicine, Christian Science is a school or system of medicine, and is entitled to recognition by the State Board of Health to the same extent as other schools or systems of medicine, and under Chapter 165 it cannot be discriminated against."

For the sake of the argument, suppose we regard a Chiropodist or a Christian Scientist, or a Magnetic Healer or a Faith Curist, or a Dermatoligist, as practicing medicine; then, as is shown by the reasoning in the case last cited, all these being schools of medicine, they must be recognized by the State Board of Medical Examiners, of Texas. If they are schools of medicine, the Magnetic Healer could only present himself with a diploma from some "reputable school of Magnetic Healing," and the Chiropodist, with a diploma from some "reputable school of chiropody," and the faith curist, from some "reputable school of faith curing," and the Christian Scientist, from some "reputable school of Christian Science," and the beauty doctor or Dermatologist, from some "reputable school" teaching that art, and all of these various schools as provided in section 7 of said Chapter 123 must necessarily have "entrance requirements and courses of instruction as high as those adopted by the better class of medical schools of the United States, and their course of instruction could not embrace less than four terms of five months each;" and as we have said such persons presenting themselves before the State Board of Medical Examiners would not obtain

under the provisions of section 9 of said Chapter 123 a license to practice magnetic healing or faith curing, or Christian Science or Chiropody or Dermatology, as the case might be, but would obtain in every case "a license to practice medicine."

If such persons are to be licensed to practice medicine society might have a great number of persons licensed to so practice "who would know nothing whatever about drugs" and medicines, that are extremely dangerous; nothing about their use and administration, and the public instead of being protected, would be exposed to the administration of dangerous, poisonous and deadly drugs by persons not possessing and not professing to possess any knowledge whatever about their properties, their use, their administration, or the conditions under which such drugs should be administered, if administered at all.

It may be said that an osteopath does not belong in the same class with Magnetic Healers, Chiropodists, Dermatologists, etc., but we suggest here that the Legislature has put all healers whether Allopaths, Homeopaths, Eclectics, Magnetic healers, Chiropodists, and all other healers in one group and declared all of them to be practitioners of medicine and the same law declares that they must not be discriminated against.

The prosecution in this case contends, and is *bound to contend*, that by said Chapter 123 of the Acts of 1907 no man without a license to practice medicine obtained as provided in said chapter can treat another in the State of Texas for any ailment, however trivial, in any way, for pay, and in this we think that the law resolves itself into an arbitrary, unreasonable, oppressive and absurd law. According to the provisions

of said Chapter 123 a chiropodist could not treat a man's feet or a beauty doctor treat a woman for blemishes or blackheads, for pay, without having a license to practice medicine as provided for in said chapter. If medicine covers and includes every kind of healing and all the ailments that flesh is heir to then every different class of healers must necessarily belong in a school by themselves. If the chiropodist does not belong to a chiropodist school, how can he obtain a diploma? He must come with a diploma of the kind already mentioned before he can even be examined for a license, and having first obtained a diploma from a bona fide reputable chiropodist school he would stand an examination and get a license, not to practice chiropody, but to practice medicine. We would probably be safe in saying that there is not a chiropodist in Texas who is a graduate of a bona fide reputable chiropodist school, having a course of instruction of four terms of five months each, and we submit that it is a perversion of legislative power for the Legislature of Texas to attempt to compel them or an osteopath to cram themselves with a great mass of knowledge that could be of no use to them or their patients.

Again, if a man has sore feet, it seems to us that he should be allowed to select his own foot doctor and pay him for his services, and that the Legislature has no right in this free country to declare that a man cannot have his feet treated for pay by anyone who is willing to do the work. If *every kind of healing* is to be recognized under said Chapter 123 as being the practice of medicine, there must necessarily be as many schools of healing as there are kinds, and in the matter of granting licenses, if this is true, and there could be no discrimination, it would be just as fair to require the doctor of med-

icine to be learned in osteopathy, chiropody, magnetic healing, Christian Science and faith curing as to require a man who follows either of these callings to be learned in medicine.

In State vs. Biggs, 46 S. E., p. 401 (N. C.) the Supreme Court of North Carolina says that "*the Legislature could no more enact that the practice of medicine and surgery shall mean practice without medicine and surgery than it could provide that two and two make five, because it cannot change a physical fact*," and in Bennett vs. Ware, 61 S. E., p. 546 (Ga.), attention is called to the fact that the defendant expressly disclaimed the use of medicine in any form, and the court says: "The purpose of the act was to protect society against the evils which might result from the use of drugs and medicine by the ignorant and unskillful," and suggests that if an act in which medicine is not used amounts to the practice of medicine in any sense, *it is so without reference to fee or reward.*

In this case the Supreme Court of North Carolina argues that under the statute "the practice of medicine shall mean practice of medicine, if a fee is charged. If no fee is charged then the words drop back to their usual and ordinary meaning." If such treatment is tolerated where no fee is charged "where is the protection to the public?" *The Legislature cannot forbid one man to practice a calling or profession, for the benefit or profit of another.*

The court in this case suggests that "if a corn doctor and the man who banishes headaches (real or imaginary) by rubbing his hands over some credulous brow, and the old woman and the herb doctors, who, without pretending to be professional nurses, relieve much human suffering, receive a small

compensation for their labor, they are to be punished unless they have a license to practice medicine." "It is not even admissible to minister to a mind diseased in any method or even dissipate an attack of the blues without such a license duly certified. * * The examination required at the hands of a Medical Board is eminently proper to one who holds himself out as an M. D. * * * But how about those who are too poor, or too ignorant, or to perverse to wish that kind of treatment? * * This is a free country and any man has a right to be treated by any system he chooses and the law can not decide as to which system he shall use. * * * * There are methods of treatment which do not require much skill and learning, if any, and patients have a right to use such methods as they wish, and an attempt to require the examination above recited for application for said treatment is not warranted by any legitimate exercise of the police power. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies like the knife and drugs but it cannot forbid dispensing with them."

In State vs. Liffring, 55 N. E. Rep., p. 168, (Ohio) the Supreme Court of Ohio held that an osteopath is not a practitioner of medicine, and holds that the Legislature would have no right to arbitrarily declare that he was a practitioner of medicine and should have a license to practice medicine. It was said that the purposes of the act was to secure to those who believe in the efficacy of medicines the ministrations of educated men and to protect society from the evils which might result from the administration of potent drugs by the ignorant and unskillful. The court further says that if the purpose of the act was to provide that those who do not propose to prac-

tice medicine shall graduate from a college of medicine, or otherwise become learned in its use, "such legislation would be an astonishing denial of the commonly accepted views touching the right to personal opinion and conduct which does not invade the rights of others," and the court suggests that such an idea is contrary to the fundamental principles of our government.

In State vs. McKnight, 42 S. E., p. 580 (N. C.) the Supreme Court of North Carolina held that the practice of osteopathy is not the practice of medicine, that the practice of medicine necessarily involves the idea of the use of medicines and drugs for the purpose of curing, and it was proper for the legislature to prescribe qualifications of a physician using drugs. "The establishment by the State of Allopathy as a state system of healing would be as foreign to our system as a state church for the cure of souls. * * * To restrict all healing to doctors of medicine might be a protection to the doctors, but that is not the object of the act. If such was its object, the law might be unconstitutional as creating a monopoly."

In State vs. Liffring, 55 N. E., p. 168 (Ohio), above cited, the court not only holds that the practice of medicine means the administration of drugs, but says that an attempt to compel the sick to employ *a graduate of medicine is outside* of the province of the Legislature.

In Nelson vs. State Board of Health, supra, the Court of Appeals of Kentucky further says, referring to a statute very similar in its terms to our Chapter 123, that a statute which would "deny to the sick all ministrations not gratuitous unless by registered physicians" *would be for the protection of*

the doctors of the state rather than the protection of the people—appellant (an osteopath) is in no proper sense a physician or surgeon. He does not practice medicine. He is rather on the plane of a trained nurse. If by kneading and manipulating the body of the patient he can give relief from suffering, we see no reason why he should not be paid for his labor as other laborers."

In Bennett vs. Ware, 61 S. E., 548, the Supreme Court of Georgia suggests that the purpose of a law regulating the practice of medicine is to protect the public against ignorance and incompetency by forbidding those who are not educated and instructed as to the nature and effect of drugs and medicines and for what diseases they should be administered from treating the sick by such medical remedial agencies and, quoting the language of Chief Justice Clark (in State vs. Biggs, supra) the court says: "Medicine is an experimental, not an exact science. All the law can do is to regulate and safeguard the use of powerful and dangerous remedies, *but it cannot forbid dispensing with them.*"

It is suggested in the case of Nelson vs the State Board of Health, 57 S. W., p. 501, above cited, that the Legislature *has no right under the Constitution to restrict the free choice of a citizen in a matter concerning only himself and not the people at large.*"

In State vs. Biggs, 46 S. E., p. 401, above cited, the Supreme Court of North Carolina says that when the Legislature attempted to forbid all treatment of all diseases, mental or physical, without surgery or medicine, or by any other method, for a fee or reward, except by a man who had graduated as a doctor of medicine, it invaded private rights and

attempted to confer a monopoly on that method of treatment.

The practice of medicine ought to be regulated because it is attended with so many dangers to human life and no man ought to be allowed to hold himself out publicly as a doctor of medicine and practice as such unless known to be competent to administer medicines, many of which are very insidious, powerful and dangerous. This is for the benefit of "all of the people all of the time," but men who do not use medicine and know of any method for relieving human suffering without medicine ought not to be prosecuted and jailed for the benefit of the medical fraternity.

In discussing such a statute as Chapter 123 of the Acts of 1907 (Texas) the Supreme Court of North Carolina, in State vs. Biggs, 46 S. E., 402, says that anyone can see that it was gotten up by the doctors of medicine for their own "protection" and not for the protection of the public and was designed to create a very dangerous and obnoxious monopoly for their benefit, and citing Lawson vs Steele, 152 U. S., p. 137, shows that such an act is arbitrary, unreasonable and unconstitutional.

The declaration of the Legislature that the treatment of any ailment or injury, however trivial, by any method for pay, is the practice of medicine, and that no one can give any such treatment or get a license to do so unless he is a graduate of a bona fide medical college, is to exclude in fact every method of treatment excepting those taught in such a medical college or at least absolutely confines the treatment of all ailments, however simple, to such graduates.

What do "bona-fide" and "reputable" mean in the de-

scription of the medical school of which one is to be a graduate? Why the law itself in section 7 gives their meaning. It says they are schools having a course of instruction "as high as the *better class of medical schools* in the United States."

How many kinds of "bona-fide reputable medical colleges" are there? It is just as essential that such a college should be medical as it should be "bona-fide" or "reputable." How could a school teaching any method of healing excepting by medicines have a course of instruction "as high as the better class of medical colleges in the United States?" Would the "better class of medical colleges in the United States" be expected to teach anything excepting the science of medicine? To have such a course every school would necessarily have to be itself a bona-fide medical college. *Does not every one know that at the time this law was passed in 1907 there was no college in the United States that could answer the requirements of said section 7, excepting a bona-fide reputable college where the scientific branches of medicine were taught."*

SECOND ASSIGNMENT OF ERROR

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 8th assignment of error, which was urged upon his appeal, and which was as follows:

"Said Chapter 123 of the Acts of the Thirtieth Legislature of Texas, if it applies to relator, Ira W. Collins, (the plaintiff in error) under the facts of this case, as an osteopath, or to any osteopath is violative of the 14th Amendment to the Constitution of the United States, in this: it discriminates in favor of nurses who practice only nursing, it being well known that such nurses treat minor ailments by the use of medicine, and sometimes without the use of

medicines, and charge therefor money or other compensation, and it discriminates in favor of masseurs who, in their particular sphere of labor, treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body, and charge therefor money and other compensation, and discriminates in favor of druggists, who prescribe remedies and charge therefor, and said Court of Criminal Appeals erred in not discharging relator, Ira W. Collins, from custody upon the final hearing of this cause, for this reason."

ARGUMENT

Chapter 123 we are considering is really a masked law not in fact designed for the protection of the public but for the protection of a certain class of professional healers and discriminates as suggested in the foregoing 2nd assignment. According to the contention of the prosecution and the chapter mentioned the doing of any act by any method for the relief of any human ailment for pay is the practice of medicine. Nurses relieve human suffering for pay but they are exempted by section 10 of the act. Masseurs who practice massage, which is defined to be "a kneading or rubbing of the body as a remedial measure," for pay are exempted and from the last sentence of section 10 it appears that "a licensed druggist not pretending to be a physician" may offer for sale remedies which he recommends for the cure of disease.

How can the Legislature declare that a masseur may rub and manipulate one who has an ailment to relieve him, for pay, or that a nurse may rub or manipulate or treat the patient as he or she may please, for pay, or that a licensed druggist may sell and recommend medicines for the cure of disease, and at the same time declare that one who claims to

be an osteopath can not rub or manipulate one who has an ailment, for pay?

We contend that such lesgislation is violative of the Fourteenth Amendment to the Consitution of the United States, which declares that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States "nor deny to any person within its jurisdiction the equal protection of the laws."

THIRD ASSIGNMENT OF ERROR

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 10th assignment of error, which was urged in said Court, upon his said appeal, and which was as follows:

"If said Chapter 123 of the Acts of 1907 (Thirtieth Legislature of Texas) applies to an osteopath who practices only as such, or applies to relator, Ira W. Collins (the plaintiff in error) under the facts of this case, then section 6, Chapter 123 of the Acts of the 30th Legislature of Texas, Regular Session, 1907, discriminates against the relator in providing for the issuance of a verification license to legal practitioners of medicine who were practicing under the provisions of previous laws, or under diplomas of reputable and legal colleges of medicine, the relator, Ira W. Collins, having been at the time said act was passed, and having been ever since it was passed, a practitioner of osteopathy. There being no provision in said law for the issuance of a verification license to relator, or other osteopath practicing osteopathy in the State of Texas, on account of such discrimination said Section 6 of Chapter 123 is violative of the 14th Amendment to the Constitution of the United States, and for this reason the said Court

of Criminal Appeals erred in not holding said act and said section void, and in not discharging the relator from further custody upon the final hearing hereof."

ARGUMENT

Who were "legal practitioners of medicine who were practicing under the provisions of previous laws" in 1907? Where would anyone go to find an answer to this question? It seems to us that he would be bound to go to the previous laws and by going to the previous laws of 1901, of which we have given a synopsis on pages 19-20 of this brief, we see that the practitioners of medicine are all carefully classified, there being no possibility of applying any provision of the law to an osteopath. In fact, as we have shown, this act of 1901, in section 13, declares in so many words that "it does not apply to persons treating diseases who do not prescribe or give drugs or medicines."

If the prosecution contends that the definition of the practice of medicine given in subdivision 2 of section 13 of the act of 1907 is to relate back then we must conclude that all of the Magnetic healers, Faith curists, Bone-setters, Chiropodists, Christian Science healers, Dermatologists, and every person who offered to cure any human ailment, however trivial, for pay, was a "legal practitioner of medicine" under previous laws. If this is true then it must follow as a matter of necessity that they were all entitled to verification licenses under the provisions of this section 6 and it would follow necessarily that none of these practitioners could be discriminated against either by the act itself, or by the Board of Medical Examiners. But every subsequent section of the act does discriminate against them in declaring that none of

them can get a license to practice without showing first that he is "a graduate of a bona fide reputable medical school," and then passing an examination in the "scientific branches of medicine." But here the prosecution is forced to say that the "practice of medicine" as mentioned in said section 6 could not have any such a broad meaning. If it does not have this broad meaning of said subdivision 2 of section 13, what does it mean? Why, as we maintain, it really means those who were in fact "legal practitioners of medicine under previous laws" and has no reference to an Osteopath, Magnetic healer, Faith curist, Chiropodist, Christian Science healer, or any person not practicing medicine under the provisions of previous laws.

If the practice of medicine as mentioned in said section 6 could not have such a broad meaning as that to which we have referred, we say that it is because the attempted definition of the "practice of medicine" in said subdivision 2 of section 13 is arbitrary, false and unreasonable.

What is meant in said section 6 by "diplomas of a reputable and legal college of medicine?" Would any one argue seriously that the Magnetic healers, Faith curists, Chiropodists, Christian Science healers or Dermatologists were practicing prior to the act of 1907 under such diplomas? Certainly not. But it is said the Legislature has declared that they were all "practicing medicine." Well, if they were in fact all "practicing medicine" they could not be discriminated against. If they had all been "practicing medicine" and could not be discriminated against, the Legislature could not require that they should show that they had been practicing under "diplomas from a reputable and legal college of med-

icine" before they could obtain a verification license.

We insist that said section 6 makes no provision whatever for the granting within one year of a verification license excepting to persons who *before the act was passed* had in *fact* been practicing medicine under the provisions of previous laws, or under "diplomas from a reputable and legal college of medicine," and if the arbitrary definition of the practice of medicine given in subdivision 2 of section 13 is to be accepted, then said section 6 clearly discriminates against all other practitioners in favor of those who had been prior to the passage of the act actually and really "practitioners of *medicine*" under previous laws, or under the diplomas mentioned in said section.

FOURTH ASSIGNMENT OF ERROR

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 12th Assignment of Error, which was urged upon his appeal, and which was as follows:

"If subdivision 2 of Section 13 of Chapter 123 of the Acts of 1907 (30th Legislature of Texas) is to be held applicable to relator, Ira W. Collins (the plaintiff in error herein) under the facts of this case, or any one simply practicing osteopathy, then said Chapter 123 is in violation of the 14th Amendment to the Constitution of the United States in discriminating against an osteopath, and relator, Ira W. Collins, in requiring that he should have a diploma from a bona fide medical school before he can present himself for examination before the Medical Board of Examiners for a license to practice, and in requiring him to accept a license to practice medicine, and the court erred in not holding said subdivision void, and

in not discharging the relator from custody upon final hearing of this cause."

ARGUMENT

We respectfully refer to our argument under the next Assignment.

FIFTH ASSIGNMENT OF ERROR

Said Court of Criminal Appeals erred in refusing to sustain the appellant's 13th Assignment of Error, which was urged upon his said appeal, and which was as follows:

"If relator, Ira W. Collins (plaintiff in error) practicing osteopathy as shown by the evidence, was practicing medicine at the time said Chapter 123 went into effect, on account of the fact that he treated some diseases by the principles of osteopathy, and osteopathy was at the time said Chapter 123 went into effect, a school of medicine, and is now a school of medicine, to require plaintiff to obtain a diploma from a medical college as defined in said Act, and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practice osteopathy would be a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, and would be in contravention of the 14th Amendment to the Constitution of the United States for this reason, and for this reason the trial court erred in not discharging the relator upon the final hearing of this cause, and erred in remanding him to the custody of the sheriff."

ARGUMENT

We must keep in mind the broad definition of a practi-

tioner of medicine as given in section 13 of the act under consideration. It declares, as we have shown, in subdivision 2 that treating or offering to treat any human ailment for pay by any method is the practice of medicine. Then all Osteopaths, and all practitioners who do not use drugs or medicines under any circumstances are in fact practitioners of medicine. Then necessarily they should all be entitled to a license to practice, if there is to be no discrimination. It will be noted that the verification license provided for in section 6 to be obtained "in one year" was not a *sine qua non*. Any practitioner of medicine could ignore that provision and apply under section 7 for a license to practice medicine, and necessarily neither the law nor the Board of Medical Examiners could discriminate in favor of any particular class of practitioners of medicine. But said section 7 and section 9 do discriminate in declaring that no one can obtain a license to practice unless he shows that he is a graduate of a "bona fide reputable medical school" and afterward passes an examination in the "scientific branches of medicine."

The prosecution may say that this does not mean the scientific branches of medicine in fact, but that "materia medica," "therapeutics," and the "practice of medicine" (as commonly understood) are to be left out. Then we would have bona fide reputable medical schools that did not teach materia medica, therapeutics, or the practice of medicine (as usually understood) and the "scientific branches of medicine" would mean branches that in fact had nothing whatever to do with medicines, and by section 9 a "license to practice medicine" could be granted by the Board to persons who confessedly would know nothing whatever about medicines.

We all know that many drugs and medicines are extremely dangerous and poisonous and that their use and administration by persons not acquainted with their properties or effects upon the human system, and not qualified to administer drugs and medicines, would be a menace to the public generally, and if said Chapter 123 would authorize the issuance of a license to practice medicine to persons who have not passed through a course of instruction in materia medica, therapeutics and the practice of medicine, that is the practice of administering drugs, then said law in so far as it authorizes the issuance of a license to practice medicine to such persons is arbitrary and oppressive and is void, as being calculated to expose the public to the administration of dangerous, poisonous and deadly drugs by persons not possessing and not professing to possess any knowledge whatever of their properties, their use, their administration, or the conditions under which such drugs should be administered, if administered at all.

The statement of Dr. Charles T. Race, shown in our statement under the first assignment, is manifestly true. He said that the "branches of medicine," materia medica, therapeutics and practice of medicine lie at the very foundation of the practice of medicine; that he could not conceive of the scientific branches of medicine as not including therapeutics, materia medica and the practice of medicine, and that he could not conceive of a reputable medical school that did not teach the branches mentioned.

These requirements of said section 7 and section 9 are equivalent to saying to every practitioner mentioned in the act (applying the broad definition mentioned) not being such

a graduate, and not being prepared to pass an examination in the scientific branches of medicine, "You can not get a license," and are equivalent to saying to relator who was engaged in a lawful and recognized business and profession you cannot follow your business.

We respectfully submit that the judgment of said Court of Criminal Appeals (and of said County Court) should be reversed and the plaintiff in error discharged.

MILLARD PATTERSON,

JO. F. WOODSON,

Attorneys for Ira W. Collins,

Plaintiff in Error.

ADDENDUM.

Watson vs. Maryland, 218 U. S., p. 173, deals with one who claimed to be a doctor of medicine—a physician—and shows how necessary it was that he should be learned in such calling. Contention was made that Watson was discriminated against by exemptions (which included manual manipulators and others). The court held the exemptions reasonable.

In Reetz vs. Michigan, 188 U. S., 505, complaint was made that he was discriminated against in not being granted a license as a physician and doctor of medicine. The trouble appears to have grown out of the fact that his diploma was not from a reputable medical college and could not be recognized.

Doctors of medicine first asked that all other persons be prohibited from using the title on the ground of danger to the people in its false use. Then when healers appeared using no medicines they asked that such healers be punished, but the courts held uniformly that they were not practicing medicine.

They then had some legislatures to attempt to change the meaning of the expression—the practice of medicine—but in every case where such laws have been sustained provision has been made for licensing osteopaths to practice osteopathy and to license some other healers, but not as physicians or doctors of medicine.

Now since they find a large part of the people going after those who heal without the use of medicines they say that one shall not be allowed to do any act of healing unless he is a graduate of a bona fide reputable medical college.

The cases we have cited in our brief show that this is an invasion of "and astonishing denial of" a mere private right of those who have ailments to be treated as well as those who are prepared to treat them in a reasonable and satisfactory way.

Respectfully submitted,

MILLARD PATTERSON,

JO. F. WOODSON,

Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
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CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 165

IRA W. COLLINS,
Plaintiff in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.

In Error to the Court of Criminal Appeals of the State of Texas.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

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GUNTHORP-WARREN PRINTING CO., CHICAGO

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STATEMENT OF FACTS.

To plaintiff in error's statement of the case (pages 1-3 of his brief), and statement of the evidence (pages 8-11), we wish to add here that the record in this case does not show that plaintiff in error ever attempted to comply with the provisions of the statute in question, either by presenting his diploma from the American School of Osteopathy to the Board of Medical Examiners, or by any attempt to obtain authority to "practice medicine" (as defined by section 13) by means of "verification license" (under section 6) or by license after examination (under sec-

tions 7 and 9); nor does the record show that he made any attempt to register in the district clerk's office of the county in which he resided (under section 4) his authority for so practicing, together with his age, post office address, place of birth and school of practice to which he professed to belong, subscribed and verified by oath.

We wish to call the attention of the court in this place to the further fact (Printed Transcript of Record, page 11—hereinafter abbreviated Pr. Tr.) that it is admitted by stipulation and agreed to as a part of the evidence herein that the Board of Medical Examiners, in passing upon the qualifications of an applicant for a license to practice, does not examine the applicant in therapeutics or materia medica.

The Court of Criminal Appeals of Texas, which is the highest court of the state in which a decision in this case could be had (Pr. Tr., 34), held on appeal, *inter alia*, that the practice by osteopathy is one of the methods of practicing medicine defined by the statute (Pr. Tr., 26), and that the statute is in all respects constitutional. (Pr. Tr., 25; s. c. 57 Tex. Crim., 2, 121 S. W., 501.)

BRIEF.

I.

The only question involved in this court is whether the Texas Medical Act of 1907 (Chapter 123, Acts of 30th Legislature) violates Section 1 of the 14th Amendment of the Constitution of the United States.

See the five assignments of error herein. (Printed Transcript of Record, 36-39, and plaintiff in error's brief.)

II.

The Act under consideration does not violate that part of Section 1 of the 14th Amendment which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

A. **This prohibition applies only to those privileges and immunities which are incident to citizenship of the United States as distinguished from citizenship of the several states.**

Slaughter House Cases, 16 Wall. (83 U. S.), 36, 74, 21 L. ed., 394.

Bartemeyer v. *Iowa*, 18 Wall. (85 U. S.), 129, 21 L. ed., 929.

Miller v. *Texas*, 153 U. S., 535, 38 L. ed., 812, 14 Sup. Ct. Rep., 876.

Orr v. *Gilman*, 183 U. S., 278, 46 L. ed., 196.

Re Kemmler, 136 U. S., 436, 34 L. ed., 519, 10 Sup. Ct. Rep., 930.

U. S. v. *Cruikshank*, 92 U. S., 542, 23 L. ed., 588.

U. S. v. *Reese*, 92 U. S., 214, 23 L. ed., 563.

Hall v. *DeCuir*, 95 U. S., 485, 24 L. ed., 547.

Kirtland v. *Hotchkiss*, 100 U. S., 491, 25 L. ed., 558.

Presser v. *Illinois*, 116 U. S., 252, 29 L. ed., 615.

B. **The right to practice medicine without regulation is not one of the privileges and immunities incident to citizenship of the United States.**

Slaughter House Cases, 16 Wall. (83 U. S.), 36, 74, 21 L. ed., 394, and other cases cited under heading "A", *supra*.

See, also, the leading case of *Dent* v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231, on the power of states to regulate the practice of medicine.

III.

The Act under consideration does not violate that part of Section 1 of the 14th Amendment which declares that no state shall "deprive any person of life, liberty, or property, without due process of law."

A. **This act was passed under the police power of the State of Texas and is a proper exercise of that power in scope and purpose. The details of such legislation rest primarily within the discretion of the state legislature. This court can only interfere when fundamental rights guaranteed under the Federal Constitution are violated by such statutes.**

Watson v. *Maryland*, 218 U. S., 173, 54 L. ed., 987, 30 Sup. Ct. Rep., 644.

Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Reetz v. *Michigan*, 188 U. S., 505, 47 L. ed., 563, 23 Sup. Ct. Rep., 390.

Hawker v. *New York*, 170 U. S., 189, 42 L. ed., 1002, 18 Sup. Ct. Rep., 573.

Meffert v. *Packer*, 195 U. S., 625, 49 L. ed., 350, 25 Sup. Ct. Rep., 790.

Williams v. *Arkansas*, 217 U. S., 79, 54 L. ed., 673, 30 Sup. Ct. Rep., 493.

People v. *Apfelbaum*, 251 Ill., 18.

State v. *Smith*, ... Mo., ..., 135 S. W., 465, 33 L. R. A. (N. S.), 179.

Parks v. *State*, 159 Ind., 211, 59 L. R. A., 190, 64 N. E., 862.

State ex rel. Burroughs v. *Webster*, 150 Ind., 607, 41 L. R. A., 212, 50 N. E., 750.

Bragg v. *State*, 134 Ala., 165, 58 L. R. A., 925, 32 S., 767.

State v. *Buswell*, 40 Neb., 158, 24 L. R. A., 68, 58 N. W., 728.

Little v. *State*, 60 Neb., 749, 51 L. R. A., 717, 84 N. W., 248.

State v. *Gravett*, 65 Ohio St., 289, 55 L. R. A., 791, 87 A. S. R., 605, 62 N. E., 325.

State v. *Marble*, 72 Ohio St., 21, 70 L. R. A., 835, 73 N. E., 1063.

People v. *Allcutt*, 102 N. Y. S., 678, 117 App. Div., 546; (affd. in 189 N. Y., 517, 81 N. E., 1171).

People v. *Mulford*, 125 N. Y. S., 680, 140 App. Div., 716 (affd. in 202 N. Y.,).

People v. *Reetz*, 127 Mich., 87, 86 N. W., 396.

People v. *Phippin*, 70 Mich., 6, 37 N. W., 888.

State v. *Miller*, 146 Iowa, 521, 124 N. W., 167.

State v. *Adkins*, 145 Iowa, 671, 124 N. W., 627.

State v. *Wilhite*, 132 Iowa, 226, 109 N. W., 730, 11 A. & E. Ann. Cas., 180.

State v. *Edmunds*, 127 Iowa, 333, 101 N. W., 431.

State v. *Heath*, 125 Iowa, 585, 101 N. W., 429.

State v. *Bair*, 112 Iowa, 466, 84 N. W., 532, 51 L. R. A., 776.

Scholle v. *State*, 90 Md., 729, 50 L. R. A., 411, 46 Atl., 326.

State v. *Yegge*, 19 S. D., 234, 103 N. W., 17.

B. **The provisions of this statute are not such as result in any arbitrary deprivation of plaintiff in error's liberty or property, or of his right to engage in a lawful calling.**

1. The qualifications of learning, skill and character required by such acts depend primarily upon the judgment of the state as to their necessity. They are in this case appropriate to the profession of healing, and are attainable by reasonable study and application, and no objection can be made to them merely on account of their stringency or difficulty.

Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Watson v. *Maryland*, 218 U. S., 173, 54 L. ed., 987, 30 Sup. Ct. Rep., 644.

Reetz v. *Michigan*, 188 U. S., 505, 47 L. ed., 563, 23 Sup. Ct. Rep., 390.

Hawker v. *New York*, 170 U. S., 189, 42 L. ed., 1002, 18 Sup. Ct. Rep., 573.

Parks v. *State*, 159 Ind., 211, 59 L. R. A., 190, 64 N. E., 862.

State v. *Bair*, 112 Iowa, 466, 51 L. R. A., 776, 84 N. W., 532.

State v. *Heath*, 125 Iowa, 585, 101 N. W., 429.

State v. *Marble*, 72 Ohio St., 21, 70 L. R. A., 835, 841, 73 N. E., 1063.

People v. *Apfelbaum*, 251 Ill., 18.
Commonwealth v. *Porn*, 196 Mass., 326, 17 L. R. A. (N. S.), 94, 82 N. E., 31.

2. The statute is general in its operation upon the subjects to which it relates: The classification as to persons who shall be regarded as "practicing medicine" thereunder, their qualification, etc., is reasonable and not arbitrary or capricious. It has a logical relation to the ends sought to be attained by the statute and applies equally to all persons similarly situated.

Watson v. *Maryland*, 218 U. S., 173, 54 L. ed., 987, 30 Sup. Ct. Rep., 644.
Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.
Williams v. *Arkansas*, 217 U. S., 79, 54 L. ed., 673, 30 Sup. Ct. Rep., 493.
State v. *Smith*, ... Mo., ..., 33 L. R. A. (N. S.), 179, 135 S. W., 465.
Parks v. *State*, 159 Ind., 211, 59 L. R. A., 190, 64 N. E., 862.

3. The provisions and regulations of the statute are enforceable in the usual mode established in the administration of government with respect to kindred matters,—that is, by proceedings adapted to the nature of the case. Due process is not necessarily judicial process. The power reposed by the statute in the Board of Medical Examiners is proper, and no point is raised as to any arbitrary, capricious or unfair action of the board.

Reetz v. *Michigan*, 188 U. S., 505, 47 L. ed., 563, 23 Sup. Ct. Rep., 390.

Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Meffert v. *Packer*, 195 U. S., 625, 49 L. ed., 350 (affirming 66 Kan., 710, 1 L. R. A. (N. S.), 811).

People v. *Apfelbaum*, 251 Ill., 18.

State, ex rel. Burroughs v. *Webster*, 150 Ind., 607, 41 L. R. A., 212, 50 N. E., 750.

Bragg v. *State*, 134 Ala., 165, 58 L. R. A., 925, 32 S., 767.

State v. *Miller*, 146 Iowa, 521, 525, 124 N. W., 167.

State v. *Buswell*, 40 Neb., 158, 24 L. R. A., 68, 58 N. W., 728.

Bandel v. *Dept. of Health*, 193 N. Y., 133, 85 N. E., 1067, 21 L. R. A. (N. S.), 49.

McGehee Due Process of Law, 52.

C. **The Texas statute is not void as exceeding the police power of the state on account of the "menace" to the public alluded to on pages 40 and 25 of plaintiff in error's brief, viz., the danger of being exposed to the administration of drugs by persons not skilled in their administration.**

1. The "menace" is a fancied one: the qualifications as to learning, character, etc., required by the act are appropriate and sufficient to guard the public from danger in this respect.

2. This court is not concerned with the wisdom or policy of the act, so long as the act fairly secures or tends to secure the objects sought to be attained by it and is not patently unreasonable.

Otis v. *Parker*, 187 U. S., 606, 608, 47 L. ed., 323, 327, 23 Sup. Ct. Rep., 168.

Hawker v. *New York*, 170 U. S., 189, 197, 42 L. ed., 1002, 1006, 18 Sup. Ct. Rep., 573.

State ex rel. Burroughs v. *Webster*, 150 Ind., 607, 41 L. R. A., 212, 216, 50 N. E., 750.

Parks v. *State*, 159 Ind., 211, 59 L. R. A., 190, 195, 64 N. E., 862.

IV.

The Act under consideration does not violate that part of Section 1 of the 14th Amendment which declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

A. **The state legislature has the power to make regulations of the character involved herein, and the details of such legislation rest primarily within the discretion of the state legislature.**

Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Watson v. *Maryland*, 218 U. S., 173, 54 L. ed., 987, 30 Sup. Ct. Rep., 644.

Reetz v. *Michigan*, 188 U. S., 505, 507, 47 L. ed., 563, 565, 23 Sup. Ct. Rep., 390.

Hawker v. *New York*, 170 U. S., 189, 192, 42 L. ed., 1002, 1004, 18 Sup. Ct. Rep., 573.

Meffert v. *Packer*, 195 U. S., 625, 49 L. ed., 350, 25 Sup. Ct. Rep., 790.

Williams v. *Arkansas*, 217 U. S., 79, 54 L. ed., 673, 30 Sup. Ct. Rep., 493.

B. **The classification made in the statute is not arbitrary, unreasonable or oppressive, and was within the legislative power of the state, as having a fair relation to the objects of the statute. Within the sphere of its operation it affects alike all persons similarly situated:**

1. In including osteopaths in the scope of the act.

2. In exempting certain classes engaged in somewhat similar practice,—*e. g.* nurses engaged strictly in nursing, masseurs in their own sphere of labor, etc.

3. In making the receipt of compensation an element in the definition of "practicing medicine."

4. In its definition of "reputable" medical schools in section 7.

5. In the enumeration of subjects for examination in section 9.

6. In the provisions for "verification licenses" in section 6.

Dent v. *West Virginia,* 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Watson v. *Maryland,* 218 U. S., 173, 54 L. ed., 987, 30 Sup. Ct. Rep., 644.

Reetz v. *Michigan,* 188 U. S., 505, 47 L. ed., 563, 23 Sup. Ct. Rep., 390.

Hawker v. *New York,* 170 U. S., 189, 42 L. ed., 1002, 18 Sup. Ct. Rep., 573.

State ex rel. Burroughs v. *Webster,* 150 Ind., 607, 41 L. R. A., 212, 50 N. E., 750.

Parks v. *State*, 159 Ind., 211, 59 L. R. A., 190, 64 N. E., 862.

People v. *Allcutt*, 102 N. Y. S., 678, 117 App. Div., 546 (affd. in 189 N. Y., 517, 81 N. E., 1171).

Little v. *State*, 60 Neb., 749, 51 L. R. A., 717, 84 N. W., 248.

Commonwealth v. *Jewelle*, 199 Mass., 558, 85 N. E., 858.

Scholle v. *State*, 90 Md., 729, 50 L. R. A., 411, 46 Atl., 326.

Bragg v. *State*, 134 Ala., 165, 58 L. R. A., 925, 32 S., 767.

State v. *Bair*, 112 Iowa, 466, 51 L. R. A., 776, 84 N. W., 532.

State v. *Marble*, 72 Ohio St., 21, 70 L. R. A., 835, 73 N. E., 1063.

Williams v. *Arkansas*, 217 U. S., 79, 54 L. ed., 673, 30 Sup. Ct. Rep., 493.

Magoun v. *Ill. Trust & Sav. Bank*, 170 U. S., 283, 42 L. ed., 1037.

V.

Plaintiff in error does not and cannot on the record in this case contend that the Board of Medical Examiners of Texas has been guilty of any unfair or unjust action toward him. His contentions are based upon fancied inequalities of the statute which arise only on his own theory of how the Act would have been construed by the board had he in fact requested from it authority to practice, or the right to take an examination as provided by the Act.

See statement of facts in printed transcript of record, pages 7-11.

Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Reetz v. *Michigan*, 188 U. S., 505, 509, 47 L. ed., 563, 566.

Hawker v. *New York*, 170 U. S., 189, 42 L. ed., 1002, 18 Sup. Ct. Rep., 573.

State v. *Miller*, 146 Iowa, 521, 124 N. W., 167.

People v. *Apfelbaum*, 251 Ill., 18, 27.

Meffert v. *Packer*, 66 Kan., 710, 1 L. R. A. (N. S.), 811; (affd. in 195 U. S., 625, 49 L. ed., 350).

VI.

While the construction of the Act by the Court of Criminal Appeals of the State of Texas may not, perhaps, be in all respects conclusive upon this court, that construction is one toward which this court will lean.

Atchison, T. & S. Railroad Co. v. *Matthews*, 174 U. S., 96, 101, 43 L. ed., 909, 911.

Watson v. *Maryland*, 218 U. S., 173, 175, 54 L. ed., 987, 989, 30 Sup. Ct. Rep., 644.

Marchant v. *Penna. R. R. Co.*, 153 U. S., 380, 385, 38 L. ed., 751, 754.

Baltimore Traction Co. v. *Belt R. Co.*, 151 U. S., 137, 38 L. ed., 102.

Minneapolis & St. L. R. Co. v. *Minnesota*, 193 U. S., 53, 48 L. ed., 614.

McGehee on Due Process of Law, 37, 40, 306, note 7.

A. **The act will be taken in this court as construed by the Court of Criminal Appeals of the State of Texas to include in the "practice of medicine" the practice of osteopathy.**

1. See opinion of Court of Criminal Appeals, Pr. Tr., 26, (s. c. 57 Tex. Crim., 2, 121 S. W., 501).

2. That is the fair and natural construction of the act.

(a) Section 13 gives a definition of "practicing medicine" broad enough to include osteopathy.

(b) The scope of the act is further shown by other provisions of the act as being the entire field of that science dealing with the prevention, cure or alleviation of disease and injury,—*e. g.* Section 10, which forbids discrimination against any particular school or system of practice.

B. **The act must also be taken as not conflicting with the constitution of Texas.**

1. See opinion of Court of Criminal Appeals, Pr. Tr. 25 (s. c. 57 Tex. Crim., 2, 121 S. W., 501).

2. *Reetz* v. *Michigan*, 188 U. S., 505, 507, 47 L. ed., 563, 566.

3. The fair construction of the act does not bring it within any limitation prescribed by the sovereign people of the state upon their lawmaking body in the constitution of Texas.

See the provision of the constitution pertaining to regulating the practice of medicine as cited in Pr. Tr. 25.

VII.

The object of the statute is to protect the sick and afflicted from the pretensions of the ignorant, the unskilled and the unscrupulous. The statute was passed to protect the health and promote the welfare of the people of Texas, and to protect them from imposition and fraud. It seeks to prohibit and punish fraud, deception, charlatanry and quackery in the practice of healing, to prevent empiricism, and to bring the practice under such control that, as far as possible, the ignorant, the unscientific, the unskilled, and the unscrupulous practitioner may be excluded.

Dent v. *West Virginia*, 129 U. S., 114, 32 L. ed., 623, 9 Sup. Ct. Rep., 231.

Hawker v. *New York*, 170 U. S., 189, 42 L. ed., 1002, 18 Sup. Ct. Rep., 573.

Watson v. *Maryland*, 218 U. S., 173, 54 L. ed., 987, 30 Sup. Ct. Rep., 644.

People v. *Allcutt*, 102 N. Y. S., 678, 117 App. Div., 546; (affd. in 189 N. Y., 517, 81 N. E., 1171).

People v. *Mulford*, 125 N. Y. S., 680, 140 App. Div., 716; (affd. in 202 N. Y. .....).

Bragg v. *State*, 134 Ala., 165, 58 L. R. A., 925, 32 S., 767.

State v. *Buswell*, 40 Neb., 158, 24 L. R. A., 68, 58 N. W., 728.

State v. *Oredson*, 96 Minn., 509, 105 N. W., 188.

O'Neil v. *State*, 115 Tenn., 427, 3 L. R. A. (N. S.), 762, 90 S. W., 627.

Parks v. *State*, 159 Ind., 211, 59 L. R. A., 190, 64 N. E., 862.

People, for use, etc., v. *Blue Mountain Joe*, 129 Ill., 370, 21 N. E., 923.

State v. *Bair*, 112 Iowa, 466, 51 L. R. A., 776, 84 N. W., 532.

Commonwealth v. *Jewelle*, 199 Mass., 558, 85 N. E., 858.

People v. *Phippin*, 70 Mich., 6, 19, 37 N. W., 888.

VIII.

In construing the Act consideration must be given to the purpose of the legislature, and to the mischief intended to be guarded against. Whether it is fair and reasonable and a valid exercise of the police power, or arbitrary and capricious must be determined in the light of the object sought to be attained by the Act.

1 Kent's Commentaries, 462.

2 Sutherland's Statutes and Statutory Construction (2nd ed. by Lewis), secs. 370, 374, 376, 456.

See also cases cited under preceding heading.

ARGUMENT.

In our outline brief, which immediately precedes this argument, we have endeavored to arrange the points contended for by defendant in error in what we believe to be their most logical order. However, in this argument, in meeting the contentions of plaintiff in error, we have attempted to follow as nearly as possible the order of argument of his brief; and our arguments in reply to his are, therefore, for the most part grouped under the headings which he has used, referring to the five assignments of error. Wherever we believed clearness or facility of reference would be gained, we have also made use of other headings and subheadings printed in heavy type.

ARGUMENT IN ANSWER TO PLAINTIFF IN ERROR'S ARGUMENT ON FIRST ASSIGNMENT OF ERROR.

Plaintiff in error has not made any attempt to comply with the provisions of the statute and does not complain of any arbitrary action of the Board of Medical Examiners.

Plaintiff in error, Collins, had not registered any certificate or authority from the Board of Medical Examiners for the State of Texas for practicing as charged in the information. It does not appear that he had at any time made application to said board for such authority and been refused a certificate. He was graduated as a doctor of osteopathy, after a

full two years' course of instruction at the American School of Osteopathy at Kirksville, Missouri, and had received from said school in 1903 a diploma which he had from then until the time of his arrest and later. Yet it does not appear that he had ever presented it to the board with a request for a verification license under section 6 of the act and been refused such license. Nor does it appear that he applied for examination under section 7 and met with a refusal of the board to allow him to take the examination on the ground that, though he was the graduate of a school, he was not a graduate of a "bona fide reputable medical school."

In short, he has made no effort to find out what construction the board would put upon the sections he complains of. He has given the board no opportunity to pass upon his diploma or his other qualifications to practice medicine as that practice is defined in the act under consideration. He has made no attempt to secure authority from the board which was invested with the power to grant such authority to duly qualified applicants. He has made no attempt to register his authority for so practicing medicine together with his age, post office address, place of birth and school of practice to which he professed to belong, as provided by section 4. He has made no effort in any of these ways to comply with the law; but instead he has contented himself with the idea that it was of no use to apply to the board because it could not possibly approve his credentials—and therefore he would not even try to have them approved.

As the case stands now, plaintiff in error does

not and cannot complain of any arbitrary or unjust or discriminatory action of the board. Nor does he complain of any unjust interpretation of the act further than to object to the holding of the court that osteopathy is included within the definition of "practicing medicine" given in section 13. The remainder of his grievance is based on what he contends *must* be the operation and construction of the act; but he has not put the statute to the test by applying for recognition and authority to practice under its provisions.

We contend that there is nothing in the act which discriminates against plaintiff in error or the school of healing to which he professes to belong. And we contend that he would stand on much firmer ground had his course not left so much to his own conjecture and interpretation.

Yet, even did he occupy that stronger vantage point which would be his had his diploma, after proper presentation, been refused recognition by the board, we believe it to be clear that this court could not in that case hold the act to be unconstitutional for the reasons urged by plaintiff in error.

He himself refers on page 21 of his brief to the leading case of *Dent* v. *West Virginia*, 129 U. S., 114, 32 L. Ed., 623. Yet in that case it appeared that Dent, at the time of the passage of the act, had for six years been engaged in the practice of medicine in West Virginia, enjoying a lucrative practice, and that he had a diploma from a certain medical school which he had presented to the members of the board of health, as provided by statute, and had asked for

their certificate. They, however, after a time, returned the diploma to him with their refusal to grant the certificate asked, because the college which had graduated Dent was not a "reputable" college as defined by the board. Dent insisted that the statute was unconstitutional as in conflict with the due process of law clause of the Fourteenth Amendment.

Mr. Justice Field, speaking for the court, said (page 123, 129 U. S.):

> "We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge his qualifications."

And on page 124 the opinion continues:

> "There is nothing of an arbitrary character in the provisions of the statute in question; it applies to all physicians, except those who may be called for a special case from another state; it imposes no condition which cannot be readily met; and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case. It authorizes an examination of the applicant by the Board of Health as to his qualifications when he has no evidence of them in the diploma of a reputable medical college in the school of medicine to which he belongs, or has not practiced in the State a designated period be-

> fore March, 1881. **If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the Board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the Board after it had decided that the diploma he presented was insufficient.**"

The sentences from the opinion in the *Dent case* which we have printed in heavy type are conclusive of the question before this court in the case at bar.

So in *Reetz* v. *Michigan*, 188 U. S., 505, 509, 47 L. Ed., 563, 566, Mr. Justice Brewer, speaking for this court, and answering the contention that Reetz had not had the benefit of a hearing by the board, said:

> "If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what extent the action of the board had deprived him of his rights.
>
> * * * The state was simply seeking to ascertain who ought to be permitted to practice medicine or surgery, and criminality arises only when one assumes to practice without having his right so to do established by the action of the board."

And in the recent case of *Watson* v. *Maryland*, 218 U. S., 173, 54 L. Ed., 987, decided in May, 1910, this court, in considering a conviction for practicing medicine in Maryland without registering in accordance with the statute, and answering the objection that the statute contained an arbitrary and un-

reasonable classification, said, Mr. Justice Day delivering the opinion (page 176, 218 U. S.):

> "It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties."

In the same opinion, Mr. Justice Day said (ibid. 177, heavy type being ours):

> "Conceding the powers of the legislature to make regulations of this character, and to exempt the experienced and accepted physicians from the requirements of an examination and certificate, **the details of such legislation rest primarily within the discretion of the state legislature. It is the lawmaking body, and the Federal courts can only interfere when fundamental rights guaranteed by the Federal Constitution are violated in the enactment of such statutes.**"

And referring to the case of *Williams* v. *Arkansas*, 217 U. S., 79; 54 L. Ed., 673; 30 Sup. Ct. Rep., 493, decided at the same term, Mr. Justice Day says for the court (page 178—heavy type by us):

> "It was therein held that regulations of a particular trade or business essential to the public health and safety were within the legislative capacity of the state in the exercise of its police

power, and that **unless such regulations are so unreasonable and extravagant as to interfere with property and personal rights of citizens, unnecessarily and arbitrarily, they are within the power of the state; and that the classification of the subjects of such legislation, so long as such classification has a reasonable basis, and is not merely arbitrary selection without real difference between the subjects included and those omitted from the law, does not deny to the citizens the equal protection of the laws.''**

The plaintiff in error relies wholly in this court upon the Fourteenth Amendment to the Federal Constitution and we submit that his objections to the Texas statute under consideration which are based upon that amendment are fully answered by the decisions in the cases of *Dent* v. *West Virginia*, 129 U. S., 114, 32 L. Ed., 623; *Watson* v. *Maryland*, 218 U. S., 173, 54 L. Ed., 987; *Reetz* v. *Michigan*, 188 U. S., 505, 47 L. Ed., 563; *Hawker* v. *New York*, 170 U. S., 189, 42 L. Ed., 1002; *Meffert* v. *Packer*, 195 U. S., 625, 49 L. Ed., 350; *Williams* v. *Arkansas*, 217 U. S., 79, 54 L. Ed., 673; *Gray* v. *Connecticut*, 159 U. S., 74, 40 L. Ed., 80; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S., 283, 42 L. Ed., 1037; and the authorities relied on in those cases.

Under the fair construction of the statute and as held by the Court of Criminal Appeals of Texas, osteopathy comes within the scope of the statute.

Section 13 of the act in question provides that "any person shall be regarded as practicing medicine within the meaning of this act * * * (2) * * * who shall treat or offer to treat any disease or disorder,

mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly money or other compensation."

The Court of Criminal Appeals of Texas is the highest court of that state in which a decision in this suit could be had. (Pr. Tr., 34.) That court has determined that under said section 13 of the act of the 30th legislature, chapter 123, plaintiff in error, upon the facts stated, was practicing medicine without a license, notwithstanding the fact that he used no medicine or drugs to relieve the patient. (Pr. Tr., 25, s. c. 57 Texas Crim., 2, 121 S. W., 501.) That court further held that osteopathy is one of the methods of curing covered by the act, and that, in order for one to practice osteopathy in Texas for pay, he must secure a license as provided for by the act. (Pr. Tr., 26.) And with reference to that provision of the constitution of Texas which says that the legislature may pass laws prescribing the qualifications of practitioners of medicine in the state, and punish persons for malpractice, but no preference shall ever be given by law to any school of medicine, the Court of Criminal Appeals held that in authorizing the regulation of the practice of medicine, the constitution was not attempting to say that the legislature was limited to any mode or method of healing, "but the word 'medicine' used in the Constitution means the act of healing by whatever scientific or supposedly scientific method may be used. It means the art of preventing, curing or alleviating diseases and remedying, as far as possible, results of violence and accident. It further means some-

thing which is supposed to possess, or some method which is supposed to possess, curative power, but if this definition of medicine is not correct, as stated in the Constitution, yet there is no limitation upon the power of the legislature in said provision of the Constitution which inhibits the legislature of this state under its police power to prevent any one practicing any species or character of remedy to cure any real or supposed ill that the body has or is subject to, for pay."

So far as the above language goes to the *interpretation* of the act and the constitution of Texas, that interpretation will be accepted as final, or at least of great persuasive force, by this court. *Watson* v. *Maryland*, 218 U. S., 173, 54 L. Ed., 987. In that case, in considering whether a certain notice should have been sent to Watson, this court said, speaking through Mr. Justice Day (page 175, 218 U. S., italics being ours):

> "The offense, the Court of Appeals held, was created wholly by section 99 in broad and general language, without exceptions or qualification, and that for conviction under that section it was not essential to prove the sending of the notice required by section 80. *This construction of the Maryland statute is conclusive upon us.* The accused had a trial before a court and jury under the statutes of Maryland, was proceeded against under the forms provided for by the laws of that state, *and under a statute which the highest court of the state has held completely defined the offense without resorting to the necessity of notifying* unregistered physicians before they become liable for the penalties of the act for practicing without registration. The contention that the conviction in this aspect was without due process of law under the Federal Constitution cannot be sustained."

See also *Marchant* v. *Pennsylvania Railroad Co.*, 153 U. S., 380, 385, 38 L. Ed., 751, 754, where this court said:

> "We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that state, and if this record presented no other question except errors alleged to have been committed by that court in its construction of its domestic laws, we should be obliged to hold, as has been often held in like cases, that we have no jurisdiction to review the judgment of the state court, and we should have to dismiss this writ of error for that reason."

See also *Atchison, T. & S. Railroad Co.* v. *Matthews*, 174 U. S., 96, 101, 43 L. Ed., 909, 911, for a limitation on the rule.

Much of the argument of plaintiff in error is based upon a fallacy in his interpretation of the words "medicine" and "medical" where they appear in the act.

Before undertaking to answer the arguments of plaintiff in error in support of his assignments of error, we wish at this point to draw the attention of the court to a fallacy which permeates plaintiff in error's entire argument—a fallacy which, by the way, is found as well in some of the cases which he has cited to sustain his arguments. That fallacy lurks in a double meaning of the word "medicine."

It may mean, and as commonly used does mean, either of two things: In one sense it means a substance or thing which has, or is believed to have, certain curative properties which are exercised upon

the body by taking the substance into the system in some way or by applying it to the body externally. When so used it is nearly synonymous with "drug." But the word has another common and well-established meaning,—which is, nevertheless, frequently overlooked or entirely ignored in these discussions upon the construction and operation of statutes regulating the "practice of medicine." That meaning is, the science or system of curing, healing, alleviating or preventing disease and physical disorders and injuries, without reference to the means employed to accomplish that end. Similarly, in the arguments of those who are attempting to prove the unconstitutionality of medical practice acts the word "medical" used in connection with "school," "college," "practice," etc., is usually construed as having to do only with medicinal substances, drugs, and the art of administering them; whereas the word has, aside from any connotation of drugs and remedial substances, the well settled meaning of "engaged in or connected with *the study or treatment of disease*" (*Century Dictionary*).

The word "medicine" is defined in *Webster's New International Dictionary, 1910,* as: "The science and art dealing with the prevention, cure, or alleviation of disease; in a narrower sense, that part of the science and art of restoring and preserving health which is the province of the physician as distinguished from the surgeon and obstetrician"; and in the other sense as: "Any substance or preparation used in treating diseases; a medicament; a remedial agent; a remedy; a physic"; while the etymol-

ogy of the word is given under "medical" as: "LL. *medicalis*, L. *medicus*, belonging to healing, from *mederi*, to heal."

The Century Dictionary gives the definitions: "A substance used as a remedy for disease; a substance having or supposed to have curative properties; hence, figuratively, anything that has a curative or remedial effect"; and: "The art of preventing, curing, or alleviating diseases and remedying as far as possible the results of violence and accident."

The Standard Dictionary, 1897, defines "medicine" thus: "A substance possessing or reputed to possess curative or remedial properties; as, a fever-*medicine;* a *medicine* for a cold * * *; and again: "The healing art; the science of the preservation of health and of treating disease for the purpose of cure."

And in *Gould's Illustrated Dictionary of Medicine, Biology and Allied Sciences, 1904,* we find these two definitions: "The science and art of preserving health, and preventing and curing disease; the 'healing art,' including also the science of obstetrics. In a more restricted sense of the word surgery is excluded. * * * The term is applied also to a particular drug or therapeutic application."

The distinction above pointed out has been recognized by several state courts which had to decide whether certain "drugless" systems and practices of healing such as osteopathy, "mechano-neural therapy," "magnetic healing," "chiropractic," etc., were included within the operation of statutes which undertook to regulate "the practice of medicine,"

"the practice of medicine in any of its branches or departments," "the practice of medicine and surgery," etc. Thus in *Commonwealth* v. *Jewelle*, 199 Mass., 558, 85 N. E., 858, the Supreme Judicial Court of Massachusetts said (page 859, 85 N. E.):

> "It would be too narrow a view of the practice of medicine to say that it could not be engaged in in any case or class of cases otherwise than by prescribing or dealing out a substance to be used as a remedy. The science of medicine, that is, the science which relates to the prevention, cure or alleviation of disease, covers a broad field, and is not limited to that department of knowledge which relates to the administration of medicinal substances. It includes a knowledge, not only of the functions of the organs of the human body, but also of the diseases to which these organs are subject, and of the laws of health and the modes of living which tend to avert or overcome disease, as well as the specific methods of treatment that are most effective in promoting cures. It is conceivable that one may practice medicine to some extent, in certain classes of cases, without dealing out or prescribing drugs or other substances to be used as medicines."

This decision is all the stronger because, although the Massachusetts statute expressly excepted from its operation certain classes of practitioners, including osteopaths and magnetic healers, yet the court held that, aside from the specifically excepted methods, there was possible a practice of medicine under the act without dealing out or prescribing drugs or other substances to be used as medicine, and that such practice might be included in the scope of the act.

In *Bragg* v. *State*, 134 Ala., 165, 58 L. R. A., 925,

32 S., 767, the Alabama Supreme Court had to determine whether the practice of osteopathy was "the practice of medicine in any of its branches or departments." The defendant contended that it was not because no drugs or other medicinal substances are administered or applied, internally or externally, nor the knife used in the treatment of diseases. It was held, however, that osteopathy was included in the meaning of the statute. The court considers at length the etymology and usage of the word "medicine," and says (page 928, 58 L. R. A.):

> "While it is true, as we have said above, there have always existed differences among physicians as to the therapeutic agencies that should be employed in the treatment of diseases, yet it has never been supposed that the disciples of any particular school of the healing art were physicians—practitioners of medicine — and those of a different school or sect were not. They have all been regarded by eminent scholars as engaged in the practice of medicine."

And continuing, the court says (ibid. 929):

> "* * * as a science the practitioners of it ['medicine'] are not simply those who prescribe drugs or other medicinal substances as remedial agents, but that it is broad enough to include, and does include, all persons who diagnose disease, and prescribe or apply any therapeutic agent for its cure."

And (ibid. 930):

> "* * * can it be seriously doubted that it was not the intention or purpose of the legislative mind to restrict the examination of those desiring to practice medicine to that class of the profession who may prescribe drugs as therapeutic agents in the healing of diseases? We think not."

In determining whether a statute making it a misdemeanor "to practice medicine" without registration applied to a "drugless" healer who purported to treat the sick by "mechano-neural therapy," the Supreme Court, Appellate Division, First Department, of New York said in *People* v. *Allcutt*, 102 N. Y. Suppl., 678, 680, 117 App. Div., 546:

> "To confine the definition of the words 'practice medicine' to the mere administration of drugs or the use of surgical instruments would be to eliminate the very cornerstone of successful medical practice, namely the diagnosis. * * * *Diagnosis would therefore seem to be an integral part of both the study and practice of medicine*, so recognized by the law as well as common sense. *The correct determination of what the trouble is must be the first step for the cure thereof.*"

It is to be noted that said decision expressly repudiates the language and reasoning of the earlier New York case, *Smith* v. *Lane*, 24 Hun, 632, decided in 1881, which is, next to *State* v. *Liffring*, 61 Ohio St., 39, 55 N. E., 168, 46 L. R. A., 334, 76 A. S. R., 358 (which we have referred to in another place in this brief), the case most frequently cited by parties who are opposing the broader construction of statutes regulating the practice of the science of healing. And we further call attention to the fact that the New York Court of Appeals, which is the court of last resort in that state, affirmed the decision of the Supreme Court, Appellate Division, without filing an opinion (189 N. Y., 517, 81 N. E., 1171), thereby approving the reasoning of that court.

We shall only cite, without detailed comment the

additional cases of *People* v. *Phippin*, 70 Mich., 6, 37 N. W., 888 (magnetic healing—"practice medicine or surgery or any branch thereof"); *State* v. *Miller*, Iowa, 124 N. W., 167 (chiropractic); *Little* v. *State*, 60 Neb., 749, 51 L. R. A., 717, 84 N. W., 248 (osteopathy—"practice medicine in any of its branches"); *Witty* v. *State*, 173 Ind., 404, 25 L. R. A. (N. S.), 1297 ("suggestive therapeutics"); *O'Neil* v. *State*, 115 Tenn., 427, 3 L. R. A. (N. S.), 762, 90 S. W., 627 (treatment by light-rays); *State* v. *Marble*, 72 Ohio St., 21, 70 L. R. A., 835, 73 N. E., 1063; *Ex parte Collins*, 57 Texas Crim., 2, 121 S. W., 501 (Transcript of Record in case at bar pp. 24-26).

The Texas act in question herein (Chapter 123 of the Acts of 1907) is so plainly intended to cover the whole conceivable field of the practice of the science of healing and curing by any method whatsoever, that it would, perhaps, have been superfluous to call attention to the danger of error through the double meaning of the words "medicine" and "medical" but for the fact that, in our opinion, plaintiff in error's brief is literally honeycombed with the fallacy alluded to above.

The statute says clearly (section 13):

> "Any person shall be regarded as practicing medicine within the meaning of this act * * * (2) * * * who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation."

Thus, plaintiff in error insists (proposition 2, page 5 of his brief) that it is arbitrary for the legis-

lature to declare that he, an osteopath, "not using *medicines* [*i. e.*, remedial substances] in any way" should obtain a license "*to practice medicine*" [*i. e.*, to treat or offer to cure disease or disorder by any system or method].

In proposition 3 (page 5 of brief) he insists that the act is arbitrary, unreasonable and oppressive in providing "that an osteopath who does not propose or pretend to use *medicine* [*i. e.*, drugs] in any way * * * shall graduate from and have a diploma of a *medical* college [*i. e.*, a college teaching the study or treatment of disease—one teaching the "practice of medicine," not as confined to the use of drugs, *but as defined by the statute itself in section 13*] and stand an examination in the scientific branches of medicine." Note that plaintiff in error here emphasizes the word "*medicine*," while the act itself provides in section 9 that "examinations shall be conducted on the scientific branches of medicine only * * *"; that is to say, in the act the emphasis is on the words "scientific" and "only," thus excluding branches that are not scientific. The act further provides that the examinations "shall include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence." *Every one of these subjects was taught and constituted part of the regular course of study at the American School of Osteopathy at Kirksville, Missouri, at the time* (1901-1903; see Pr. Tr., 7) *plaintiff in error attended that school* (see testimony of Miss Hyde, Pr. Tr., 9-10); and in addition there were taught at that school "symptomatology,

osteopathic therapeutics and neurology." Note further that the Board of Medical Examiners of Texas, *in passing upon the qualifications of applicants for licenses to practice*, under this statute, *does not examine them in therapeutics or materia medica.* (Pr. Tr., 11.)

In what respect, therefore, can plaintiff in error truthfully say that the operation of this statute works a hardship on him? It must be borne in mind that he has never applied to the board for a certificate nor has his diploma from the American School of Osteopathy been refused credit by the board. He has, on the contrary, made no attempt to comply with the statute and *bases his complaint of hardship, and arbitrariness, and oppressiveness upon his conjecture and belief as to how the board would have acted had he in fact applied to it for authority to practice medicine as defined by the act.*

Proposition 4 (page 5 of the brief) rests upon the same fallacious ground, as do proposition 5 (page 6) and, in part at least, proposition 7 (page 7).

Similarly on pages 14-18, in attempting to make a compendious statement of the Texas act in question, he calls attention by means of italics to the words "medicine" and "medical" whenever they occur in the act. His purpose is, it seems, to indicate that (as he mistakenly believes) only the "practice of medicine" that uses drugs is meant; whereas the meaning of the words in common usage is not so restricted, and furthermore *in this act the words are specifically given a meaning broad enough to include drugless systems and schools of healing as well.* To

persist in the view of the act which plaintiff in error holds and which is the key to his whole argument, is to lose sight entirely of the definition of "practice of medicine" as embodied in the statute (section 13). Every recurrence of the words "medicine," "practice of medicine" and "medical" in the act must be considered in connection with that broad, undiscriminating definition. And it must be considered further in the light of that beacon of construction furnished by the statute itself in section 10: *"Nothing in this act shall be (so) construed as to discriminate against any particular school or system of medical practice."* Osteopathy is included in section 13; it must therefore be included in section 10, and there can be no discrimination against plaintiff in error on the ground that he is an osteopath.

Indeed there has been no such discrimination. Plaintiff in error merely insists that there would have been had he applied to the board for legal authority to practice. Had there been any unfair or unjust action on the part of the board in refusing him a certificate, then, in the words of Mr. Justice Field, speaking for this court in *Dent* v. *West Virginia*, 129 U. S., 114, 125, 32 L. Ed., 623,

> "we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient."

And to the same effect, see *Reetz* v. *Michigan*, 188 U. S., 505, 509, 47 L. Ed., 563, 566.

On pages 31-32, plaintiff in error asks what are

"bona fide reputable medical schools" as provided in section 7, and says that his question is answered by the same section. That answer in full as it appears in section 7 is:

> "Such schools shall be considered reputable within the meaning of this act whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each."

Plaintiff in error says (page 32, italics being ours):

> "It is just as essential that such a college should be medical as it should be 'bona-fide' or 'reputable.' How could a school teaching any method of healing excepting by *medicines* have a course of instruction 'as high as the better class of *medical* colleges in the United States'?"

Again we insist that plaintiff in error is creating for himself the construction of the statute which he complains of so bitterly. The Board of Medical Examiners have not so construed the act so far as this record discloses. It nowhere appears that they rejected plaintiff in error's diploma from the American School of Osteopathy as not being that of such a "bona fide reputable medical college." There is no reason to suppose they would do so on the sole ground that that school taught nothing about the use of drugs, as plaintiff in error intimates. *He has not given them a chance to consider his diploma.* Can it be presumed, furthermore, without the slightest evidence, that the board has in the past or will hereafter disregard the plain declaration of section 10 that "nothing in this act shall be (so) construed as

to discriminate against any particular school or system of medical practice''—the words ''medical practice'' being interpreted in the light of the definition of ''practicing medicine'' in section 13? Most assuredly, no such presumption of unfairness and discrimination can be indulged in here as a basis for argument.

The same fallacy which plaintiff in error was, in spite of section 13, led into by assuming that ''medicine'' is always synonymous with ''drug,'' can likewise be detected in several of the authorities which he quotes in support of his points. See the language quoted on pages 23, 29 and 30 of his brief from the opinion of the Court of Appeals of Kentucky in *Nelson* v. *State Board of Health*, 108 Ky., 769, 57 S. W., 501; the language of the Supreme Court of North Carolina in *State* v. *Biggs*, 133 N. C., 729, 64 L. R. A., 139, 46 S. E., 401, 98 A. S. R., 74, quoted on pages 27, 30 and 31 of plaintiff in error's brief; the language of the same court in *State* v. *McKnight*, 131 N. C., 717, 42 S. E., 580, 59 L. R. A., 187, quoted on page 29 of plaintiff in error's brief; and the language of the Georgia court quoted on pages 27 and 30 of the brief.

We desire furthermore to call the attention of the court to the fact that the latter decision, *Bennett* v. *Ware*, 4 Ga. App., 293, 61 S. E., 548, was not, as stated on page 30 of plaintiff in error's brief, by the Supreme Court of Georgia, but by the Court of Appeals, consisting of three judges. It is further worth noting that the language quoted is taken from the opinion of Chief Justice Hill, while the two other

justices concurred specially, and Justice Russell in a separate opinion says (4 Ga. App., 303-4):

> "I concur, but my concurrence is really a dissent from the views so ably propounded by Chief Justice Hill in his opinion. * * * I can not agree to the proposition that the object of this statute is only to forbid quacks from pretending to be regular physicians when they are not so;"

and (on page 305) calls attention to the danger and injustice of making it possible for "the ignorant and superstitious parent" to take "his child, critically ill, to a 'magic healer,' when he should seek the advice and treatment of some skilled physician, and thereby lets it die." The action in that case was malicious prosecution by a "magic healer" against one who had sworn out a warrant for his arrest for practicing without a license. The lower court sustained a demurrer to the petition and this judgment was affirmed by the Court of Appeals of Georgia. We do not regard the case as an authority against the contentions of the State of Texas in the case at bar.

The case of *State* v. *Liffring*, 61 Ohio St., 39, 55 N. E., 168, 46 L. R. A., 334, 76 A. S. R., 358, cited by plaintiff in error on pages 28 and 29 of his brief, can not be urged against the defendant in error for the reason that the Supreme Court of Ohio in holding that osteopathy was not included in the Ohio statute then (1899) in force construed a peculiar definition of the practice of medicine and surgery contained in the statute and held that the word "agency" appearing therein must, by reason of the rule of construction *noscitur a sociis* be limited by the associated words "drug" and "medicine." The same court has itself distinguished the *Liffring* case

in *State* v. *Gravett,* 65 Ohio St., 289, 55 L. R. A., 791, 87 A. S. R., 605, 62 N. E., 325; and *State* v. *Marble,* 72 Ohio St., 21, 70 L. R. A., 835, 73 N. E., 1063, and construed a later statute as attempting

> "*a comprehensive regulation of the healing art, so far, at least, as to require the preparatory education of those who, for compensation, practice it according to any of its theories*" (*State* v. *Gravett, supra*).

On page 31 of his brief plaintiff in error slips into the same error again when he complains that

> "men who do not use medicine and know of any method for relieving human suffering without medicine ought not to be prosecuted or jailed for the benefit of the medical fraternity" [*i. e.,* presumably, those practitioners of medicine who use drugs in their practice].

Plaintiff in error was not prosecuted because he did not use drugs, but because he had not registered any authority, as provided by statute, to practice any method of healing. He did not make the slightest attempt to follow the law even to the extent of offering himself for examination, or presenting his diploma to the board with the request for a certificate.

Had plaintiff in error been a practitioner of medicine who used drugs in his treatments he would just as surely have laid himself open to prosecution by pursuing the course he in fact did pursue,—namely by practicing without registering his authority to do so. For, under the statute, if the ablest allopathic physician in the world, or his equal in homeopathy, should reside in Texas and undertake to practice his profession for compensation without registering his

authority for so practicing in the district clerk's office of the county in which he resides, he would be violating the statute now under consideration. No diploma and no term of successful practice would avail him if he had failed or refused to act in accordance with the statutory requirements of license from the board and registration of authority, and he would be liable to fine and imprisonment to the same extent—no more and no less—as is plaintiff in error. In short, the statute, as declared in section 10, does not discriminate between schools or systems of medical practice. It is concerned, however, in the regulation of the practice of medicine as defined in section 13, to the end that no person who is ignorant of the functions and organs of the human body, with the symptoms and treatment of disease, and with the laws of hygiene—and no person who is not of good moral character, or under the age of twenty-one years—shall undertake for compensation to treat the sick, the injured, the dying, who may be ignorant or otherwise unable to judge for themselves of the qualifications of those who profess to be skilled in the art of healing and curing.

The fact that the statute makes one element of "practicing medicine" as defined by Section 13 the receipt of money or other compensation does not offend the 14th Amendment.

Proposition 6 under the first assignment of error (Brief, page 6) is based, in part, upon the theory that the statute is rendered objectionable in that the offense defined by it is made to depend upon whether or not the operator received pay for his services

(Section 13, Clause 2). He does not urge this point very strongly in his argument, but does refer to it in half a dozen sentences on page 27 of his brief.

The classification by the statute of persons practicing medicine with reference to their doing so for compensation or gratuitously is reasonable and was within the discretion of the state legislature primarily.

In the case of *Watson* v. *Maryland*, 218 U. S., 173, 54 L. Ed., 987, a statute of Maryland was under consideration which was assailed, among others, on the ground that undue discrimination was shown and equal protection of the law denied in the exception provided for. *One of these exceptions was in favor of gratuitous services.* Mr. Justice Day, delivering the opinion of this court, said (italics being ours):

> "*We shall not take occasion to consider each of these exceptions. A reading of them makes it manifest that they are not without reason.* Before a law of this kind can be declared violative of the 14th Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is 'no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.'
>
> * * * * The selection of the exempted classes was within the legislative power, subject only to the restriction that it be not arbitrary or oppressive, and apply equally to all persons similarly situated. We can not say that these exceptions nullify the law."

With regard to the provision in the Texas act in regard to practicing for compensation it is, perhaps,

superfluous to suggest the reasons for the classification.

The purpose of this act, and others of a similar nature, is to protect the public against charlatanism, ignorance and quackery (*Bragg* v. *State,* 134 Ala., 165, 32 S., 767, 58 L. R. A., 925; *People* v. *Allcutt,* 102 N. Y. Suppl., 678, 117 App. Div., 546—affirmed, 189 N. Y., 517, 81 N. E., 1171); to protect the afflicted from the pretensions of the ignorant and avaricious (*State* v. *Buswell,* 40 Neb., 158, 24 L. R. A., 68, 58 N. W., 728).

In *State* v. *Oredson,* 96 Minn., 509, 105 N. W., 188, the Minnesota Supreme Court said of the medical statute in that state:

> "It was designed to secure the public in whole and every part from quacks, humbugs and charlatans masquerading under the venerable and honorable titles of surgeons, physicians and doctors, and to protect the public in a just reliance upon the one using these titles as a man of proper education and sufficiently trained in the sciences involved. A just enforcement of that act would tend to prevent the most deplorable swindling of the ignorant poor, who can least afford to pay for the luxury of deception, and who are the most likely to be the dupes of ostensible practitioners, whose competency has not been determined by law, and whose moral deficiencies are evidenced by their false pretenses."

In accord with these decisions, see also *People* v. *Phippin,* 70 Mich., 6, 37 N. W., 888; *State* v. *Edmunds,* 127 Iowa, 333, 101 N. W., 431; *Witty* v. *State,* 173 Ind., 404, 25 L. R. A. (N. S.), 1297, 90 N. E., 627; *State* v. *Marble,* 72 Ohio St., 21, 70 L. R. A., 835, 73 N. E., 1063, and cases cited in our brief.

The purpose of the statute being as above declared, how can it be seriously contended that it is arbitrary, unreasonable and without relation to the objects to be attained by the law to take as one basis for classification, the receipt of compensation for services? How many charlatans and quacks will engage in practice and treat or offer to treat diseases, absolutely free of charge?

ARGUMENT IN REPLY TO PLAINTIFF IN ERROR'S ARGUMENT ON SECOND ASSIGNMENT OF ERROR.

The second assignment of error is directed against the classification of persons exempted from the act and is apparently based upon that clause of the Fourteenth Amendment which prohibits a state from denying to any person within its jurisdiction "the equal protection of the laws," as well as upon the "due process of law" clause. The objection is that osteopaths are wronged (if the act applies to them) by the fact that the act discriminates in favor of nurses who practice only nursing, etc.

These exemptions from the operation of the statute are found in section 10, and the exempted classes are:

1. Dentists legally qualified and registered under the laws of Texas who confine their practice strictly to dentistry;

2. Nurses who practice only nursing;

3. Masseurs, in their particular sphere of labor, who publicly represent themselves as such;

4. Commissioned or contract surgeons of the United States Army, Navy or Public Health and Marine Hospital Service, in the performance of their duties; but such shall not engage in private practice without license from the Board of Medical Examiners;

5. Legally qualified physicians [as to meaning of "physicians" see section 16 of act] of other states called in consultation, but who do not open offices or appoint places in Texas where patients may be met or called to see.

6. "This act shall be so construed as to apply to persons other than licensed *druggists* of this state not pretending to be physicians, who offer for sale on the streets or other public places remedies which they recommend for the cure of disease."

We fail to see any arbitrary or unreasonable classification here. Osteopaths claim to be more than mere nurses or masseurs. They profess to diagnose diseases and injuries and to determine upon a curative course of treatment. Nurses and masseurs do neither of these things. A nurse does not profess to be able to determine what illness a patient is afflicted with. She does not profess to be able to say whether a patient has typhoid, or appendicitis, or scarlet fever, or diphtheria or measles. On the contrary she simply undertakes to perform certain mechanical ministerial acts—requiring skill and experience, but not the skill of one who professes to be able to diagnose and direct the treatment of a disease. Her work is merely to give baths, or apply ice-packs, or take the temperature at stated intervals, usually under the direction of a physician or "practitioner

of healing" to whom she bears the relation of an assistant. Moreover, to remain exempt under this statute she must practice only nursing and if she steps over the line between nursing and practicing medicine she becomes amenable to the act. As the Supreme Court of New York said in *People* v. *Allcutt,* 102 N. Y. Suppl., 678, 117 App. Div., 546 (affirmed by Court of Appeals, 189 N. Y., 517, 81 N. E., 1171):

> "It may be difficult by a precise definition to draw the line between where nursing ends and the practice of medicine begins, and the court should not attempt, in construing this statute, to lay down in any case a hard and fast rule upon the subject, as the courts have never undertaken to mark the limits of the police power of the state, or to have precisely defined what constitutes fraud. What the courts have done is to say that given legislation was or was not within the limits of the police power, or that certain actions were or were not fraudulent."

Similarly, masseurs must remain in their own particular sphere of labor to be exempt. There is a field for the manipulator of muscles who does not purport nor hold himself out to be skilled in diagnosing diseases or curing them which is not unreasonably set apart from that of the osteopath, whose claims are of a more pretentious nature.

The exemption numbered 6 by us, relating to druggists, is as plainly free from objection as the others. The statute does not allow druggists freedom to practice medicine. It prohibits street venders of remedies which they recommend for the cure of disease from offering such remedies for sale without conforming to the act, but makes a distinction

in favor of druggists *not pretending to be physicians.* This clause is capable of a reasonable construction that will permit druggists to offer for sale remedies which they recommend for the cure of disease, without permitting them to practice medicine as defined by the statute; and we believe this court will feel safe in leaving to the state courts the task of running the line of demarcation which separates lawful conduct from unlawful conduct on the part of such druggists under this act.

In the words of Mr. Justice McKenna, speaking for this court in *Magoun* v. *Illinois Trust and Savings Bank,* 170 U. S., 283, 294, 42 L. Ed., 1037:

> "In other words, the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

And (ibid. 296):

> "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things. Bearing these considerations in mind we can solve the questions in controversy."

And directly in point on this phase of the Texas statute is the recent case before referred to of *Watson* v. *Maryland,* 218 U. S., 173, 54 L. Ed., 987. As in the case at bar, so in that case, it was urged that there was unjust discrimination and a denial of equal protection in the exceptions provided for, which were in favor of gratuitous services, resident physicians and students at hospitals in discharge of their

hospital duties, out-of-state physicians in actual consultation, commissioned army, navy and marine hospital surgeons, chiropodists, midwives, masseurs and other manual manipulators who used no other means, surgeons residing on the borders of the state, and dentists.

Mr. Justice Day spoke for this court as follows (218 U. S., 179—heavy type being ours):

> "We shall not take occasion to consider each of these exceptions. A reading of them makes it manifest that they are not without reason. **Before a law of this kind can be declared violative of the 14th Amendment as an unreasonable classification of the subjects of such legislation because of the omission of certain classes, the court must be able to say that there is 'no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.'** Such was the expression of this court in *Missouri, K. & T. R. Co.* v. *May*, 194 U. S., 269, 48 L. Ed., 972, 24 Sup. Ct. Rep., 638, quoted with approval in *Williams* v. *Arkansas, supra* (217 U. S, 79, 54 L. Ed., 673, 30 Sup. Ct. Rep., 493.)"

See also:

> *Parks* v. *State*, 159 Ind., 211, 59 L. R. A., 190, 64 N. E., 862, and cases cited therein.

We respectfully contend that those exceptions in the Texas act which are not identical with the exceptions in the Maryland act, just referred to, are, when tried by the above test, as free from any taint of unjust discrimination—for they are "not without reason."

The classification is manifestly founded on good reasons: it is neither arbitrary nor unreasonable.

So far as objection is made to this provision of the Texas statute under that clause of the Fourteenth Amendment *prohibiting the abridgment of "the privileges and immunities of citizens of the United States,"* that point is not urged in the argument of plaintiff in error, and therefore we shall only say that those words of the Fourteenth Amendment have now a well-settled meaning and do not include the right to practice the science of healing without a state license.

The privileges and immunities referred to in that amendment are only such as are incident to citizenship of the United States as distinguished from citizenship of the several states—those privileges and immunities which arise out of the nature and essential character of the national government and are granted or secured by the Constitution of the United States.

Such are the right to engage in foreign and interstate commerce, to have the benefit of the postal laws, to make use in common with others of the navigable waters of the United States, to pass from state to state and into foreign lands, to visit the seat of the government without being subjected to the payment of a tax for the privilege, and others which relate to subjects over which the jurisdiction of the Federal Government extends as distinguished from that of the individual states.

Further enumeration is not necessary to make the point clear that plaintiff in error cannot assail the validity of the Texas statute under this clause. The right to practice the healing art is not a privilege incidental to citizenship of the United States.

The distinction on which we rely was first laid down in the *Slaughter House cases*, 16 Wall. (83 U. S.), 36, 74-80, 21 L. Ed., 394, and is established beyond the need of argument by a long series of cases. See *Bartemeyer* v. *Iowa*, 18 Wall., 129, 21 L. Ed., 929; *Miller* v. *Texas*, 153 U. S., 535, 38 L. Ed., 812, 14 Sup. Ct. Rep., 876; *Orr* v. *Gilman*, 183 U. S., 278, 46 L. Ed., 196; *Re Kemmler*, 136 U. S., 436, 34 L. Ed., 519, 10 Sup. Ct. Rep., 930; *U. S.* v. *Cruikshank*, 92 U. S., 542, 23 L. Ed., 588; *U. S.* v. *Reese*, 92 U. S., 214, 23 L. Ed., 563; *Hall* v. *De Cuir*, 95 U. S., 485, 24 L. Ed., 547; *Kirtland* v. *Hotchkiss*, 100 U. S., 491, 25 L. Ed., 558; *Presser* v. *Illinois*, 116 U. S., 252, 29 L. Ed., 615.

ARGUMENT IN REPLY TO PLAINTIFF IN ERROR'S ARGUMENT ON THIRD ASSIGNMENT OF ERROR.

The third assignment of error herein is based on section 6 of the Texas act which provides for the granting of "verification licenses" by the Board of Medical Examiners in certain specified instances.

Plaintiff in error has (on pages 35-37) here endeavored to transfix defendant in error upon one or the other horn of a dilemma, but we fear that we fail to comprehend the full force of his argument. He proceeds upon the assumption that no verification license could have been obtained by him under section 6. *Here again he is forced to rely upon conjecture, for the record does not disclose that he ever made application to the board for a verification license.* Whether he would have been refused such a license,

we do not believe it profitable to speculate upon, as long as there was in fact no refusal and indeed no application to be refused. But we wish to call the court's attention to these significant facts: As plaintiff in error says on page 20 of his brief, the preceding Texas Medical Practice Act of 1901 exempted from its operation "persons treating disease who do not prescribe or give drugs or medicine." Section 6 of the later act of 1907 now under consideration provides for verification licenses within a year to certain classes of "legal practitioners of medicine" who should present to the board documents sufficient to establish, *inter alia*, "exemption existing under any law." Section 15 of the act of 1907 provides that "any person who may, when this act shall take effect, be practicing medicine within this state under the provisions of existing laws or under any exception contained therein, but without license, may for one year thereafter, but not longer, continue in such practice, without license." That plaintiff in error came within this class we do not undertake to say; but on this record neither do we admit that he did not. He has not put the board to the test on this provision any more than he has on any other, and it is not apparent from a consideration of these sections of the act that they are not capable of a construction not violative of the 14th Amendment.

But we will go further and say that, even were plaintiff in error right in saying that section 6 made no provision for issuing verification licenses to osteopaths, the section would still be innocuous.

Practitioners of medicine who used drugs or medi-

cines in their treatments had already been subjected to regulation by the act of 1901. In 1907 the legislature had a right to apply other and different regulations to these same practitioners: *Dent* v. *West Virginia,* 129 U. S., 114, 123, 32 L. Ed., 623. On the other hand, osteopaths had been exempted from the provisions of the earlier act. We contend that, since the practitioners affected by the 1901 statute had been put to the trouble of complying with the conditions imposed by that act and had been compelled at that time to give evidence to a previous board that they possessed the necessary qualifications of learning, skill and character to entitle them to authority to practice, there is nothing iniquitous nor unreasonable in providing in the later act of 1907 means for verifying their previous authority and sparing them the labor of proving again to the new board the qualifications which had already been approved. If osteopaths are not permitted verification licenses under the act of 1907, they are in no worse plight now than were those practitioners in 1901 who were using drugs in their systems of treatment of the sick and were at that time compelled by the earlier act to prove their qualifications before receiving legal authority to engage or continue in practice.

Under the decision of *Watson* v. *Maryland,* 218 U. S., 173, 54 L. Ed., 987, and kindred cases cited above, such a provision does not violate the equal protection clause of the 14th Amendment.

ARGUMENT IN REPLY TO PLAINTIFF IN ERROR'S ARGUMENT ON FOURTH ASSIGNMENT OF ERROR.

Under the fourth assignment of error we again insist that plaintiff in error has no just cause for complaint, *because it nowhere appears in this record that the Board of Medical Examiners refused to allow him to take the examination provided for in sections 7 and 9 of the act, nor that the board refused to regard his diploma as sufficient.*

Once more we quote the language of this court, by Mr. Justice Field, in *Dent* v. *West Virginia*, 129 U. S., 114, 124, 32 L. Ed., 623:

> "If, in the proceedings under the statute, there should be any unfair or unjust action on the part of the board in refusing him a certificate, we doubt not that a remedy would be found in the courts of the state. But no such imputation can be made, for the plaintiff in error did not submit himself to the examination of the board after it had decided that the diploma he presented was insufficient."

It is to be noted that in the *Dent* case plaintiff in error had presented to the board a diploma and had requested a certificate; but the certificate had been refused on the ground that the diploma was not from a reputable college. Yet nowhere in the opinion is this referred to as an unlawful or unfair action of the board; but, on the contrary, the statute making such action possible is upheld.

So far as concerns the latter part of this assignment of error, we fail to see how there is unjust discrimination against an osteopath in the mere fact

that he is "required" to accept *a license to practice medicine,* as long as he is permitted *to practice his own system of healing* under that license.

Section 10 indicates the spirit of said act:

> "Nothing in this act shall be so construed as to discriminate against any particular school or system of medical practice."

ARGUMENT IN REPLY TO PLAINTIFF IN ERROR'S ARGUMENT ON FIFTH ASSIGNMENT OF ERROR.

Once more we are compelled to repeat that plaintiff in error has in reality suffered no hardship except as a result of his own ill-advised conduct.

Why should he assume, without taking the pains to find out, that his diploma would not be honored? There is nothing in the statute to indicate that it would not be. Why did he not submit his diploma to the board and request its certificate or the right to take an examination?

Plaintiff in error's great trouble throughout has been, as we have pointed out before, that he has acted upon his own construction of the statute, instead of applying to the Board of Medical Examiners for license or examination, and thus ascertaining definitely what construction was, in actual practice, being given to the statute. We insist, furthermore, that his construction is not the proper construction because it is not the reasonable, fair one. It fails utterly to recognize the impartial spirit of the act, as shown by section 10, as well as its broad scope, as shown in section 13. And his failure to use

the definition of "practicing medicine" laid down by the legislature in section 13 as his touchstone in testing the meaning of the same or allied words—such as "medicine" and "medical"—in other parts of the act has led him into a totally illogical interpretation of the act.

Nowhere is that illogical tendency more plainly disclosed than in his phrasing of his fifth assignment of error on page 38 of his brief.

He objects, first, that if osteopathy is a school of *medicine* under said statute, then it is discriminatory to require him to obtain a diploma from a *medical* college as defined by the same act. Could anything be more absurd?

If (as in fact the Court of Criminal Appeals of Texas held) practicing osteopathy is practicing medicine under said statute, and if osteopathy is a school of medicine under that act, then the logical conclusion is that an osteopathic college is a medical college under the same act. *And there is not a fact in the record to show that it would not be so regarded.*

Plaintiff in error objects, secondly, that it would be discriminating to require him to pass an examination in the "scientific branches of medicine"—that it would be a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, and therefore violative of the 14th Amendment.

This objection rests on the same false premises as the first. Plaintiff in error insists that the "scientific branches" of medicine on which the examina-

tions are to be conducted according to section 9 of the act *must* include "materia medica, therapeutics and practice of medicine." He bases this insistance upon the testimony of his own witness, Dr. Race. (Pr. Tr., 9.) If that were a proper source from which to ascertain what subjects the examinations given by the board cover, it might be noted that Dr. Wright, the other witness who testified on this point, does not include these subjects in his list of the "scientific branches."

But what a futile method of ascertaining the scope of these examinations! What subjects does the board as a matter of fact examine applicants on?

The record shows (Pr. Tr., 11) in the form of a stipulation of facts "that the Board of Medical Examiners, in passing upon the qualifications of an applicant for a license to practice, *does not examine the applicant in therapeutics or materia medica.*"

And the very section (9) which provides for examinations enumerates these as the subjects for examination:

> "*Anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence.*"

Now, as stated before, the record in the case shows that plaintiff in error is a graduate of the American School of Osteopathy at Kirksville, Missouri (Pr. Tr., 7), which apparently is the original school of osteopathy (Pr. Tr., 8); that after completing a full two years' course of instruction in that school he

was graduated as doctor of osteopathy, and received in the spring of 1903 a diploma from that school.

The record further discloses (Pr. Tr., 9-10) that the witness Hyde was graduated from the same school in January, 1903, after completing a two years' course; that she was attending this school at the same time as plaintiff in error; *and that during that time the regular course of study and instruction at that school included anatomy, physiology, chemistry, pathology, bacteriology, symptomatology, osteopathic therapeutics, histology, obstetrics, gynecology, surgery, neurology, diagnosis, laws of health, hygiene, and medical jurisprudence;* that osteopathic diagnosis includes physical diagnosis and that they used symptomology also for the diagnosis of cases; and that all those subjects were necessary to be studied at that time in order to obtain a regular diploma.

A comparison of the subjects enumerated in section 9 of the act as set out above with those constituting the regular course of study and instruction necessary for a diploma at the American School of Osteopathy shows that *there was not one subject required in the examination under the act that was not taught at the school attended by plaintiff in error and whose diploma he holds!*

He attempts to reduce the proposition of defendant in error to an absurdity by saying (on page 39 of his brief):

> "Then we would have bona fide reputable medical schools that did not teach materia medica, therapeutics, or the practice of medicine (as usually understood)."

There is nothing absurd in that if we keep in mind the purpose of the act, *which is to regulate all systems and methods of healing and curing,* and if we keep in mind *the definition of "practicing medicine" given in section 13.*

Plaintiff in error continues in the same vein (*ibid.*): "and the 'scientific branches of medicine' would mean branches that in fact had nothing whatever to do with *medicines*" [*i. e.,* drugs]. Neither, we contend, is there anything absurd—nor anything oppressive and violative of the 14th Amendment—in that. For those branches, while they may not have much to do with drugs, yet have a great deal to do with *the science and art dealing with the prevention, cure, or alleviation of disease, injuries and other physical disorders*—which is the field covered by the Texas statute.

His second objection under his fifth assignment of error therefore is, like the first, without any foundation in fact or reason.

And yet, even if the above comparison of subjects of study and of examination did not so completely refute his objection, there is another consideration that would as effectually dispose of it.

> **"There is * * * no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."** (Mr. Justice McKenna in the opinion of this court in *Magoun* v. *Illinois Trust and Savings Bank,* 170 U. S., 283, 294, 42 L. Ed., 1037.)

It is not a good argument to contend that the act is violative of the 14th Amendment merely because some individual who wishes to engage in the practice of healing has not the educational qualifications prescribed by the statute, *so long as those qualifications are appropriate and attainable by reasonable study and application. No one has a right to practice medicine who has not the necessary qualifications of learning and skill; and, subject to the rule of reasonableness, the nature and extent of the qualifications required must depend upon the judgment of the state as to their necessity.*

The mere fact that the statute requires examination in some subjects that are not directly "useful" to osteopaths is not such an objection as will invalidate it. That is but one of the little practical inequalities that no legislation in this and similar fields can possibly avoid. The same "inequality" is experienced by one who enters upon the study of the science of healing with the fixed purpose of practicing exclusively in some restricted branch of that science—for example, abdominal surgery—and who, as a matter of fact, carries out that purpose. Has it ever been seriously urged as a reason for holding a medical practice act unconstitutional that the act is arbitrary, discriminatory and oppressive merely because such person cannot obtain a license to practice this one branch of the science without taking an examination or otherwise evidencing his qualifications in other subjects for which he has no direct "use"?

Or, in the case of an applicant for admission to

the bar, could it be contended that, in case the applicant really intended (and afterwards acted on that intention) to practice only the law of commercial paper, it would be unjust and discriminating to compel him to be examined in such subjects as torts, the relation of master and servant, criminal law and constitutional law, and that a statute or rule which required such examination offended the 14th Amendment?

Our proposition is self-evident and has been approved judicially in a number of cases.

In *State* v. *Heath,* 125 Iowa, 585, 101 N. W., 429, 431, the Iowa Supreme Court, in passing upon a statute requiring all practitioners, regardless of the particular school, to be examined in anatomy, physiology, chemistry, pathology, surgery and obstetrics, held that it was not unreasonable to exact from every one who undertook to prevent, cure or alleviate disease and suffering some knowledge of the nature of disease, its origin, its anatomical and physiological features, its causes and even of the action of drugs. "At any rate, the state, in order to guard the people against the effects of imposition or ignorance, had the right to exact such knowledge."

In *State* v. *Marble,* 72 Ohio St., 21, 70 L. R. A., 835, 73 N. E., 1063, the Ohio Supreme Court said (page 841, 70 L. R. A.):

> "To admit that a practitioner may determine what treatment he will give for the cure of disease, and that the state may examine him only respecting such treatment, would be to defeat the purpose of the statute, and to make effective legislation of this character impossible. If the

recent statute is too comprehensive, the remedy is with the legislature."

To the same effect see also *O'Neil* v. *State,* 115 Tenn., 427, 3 L. R. A. (N. S.), 762, 90 S. W., 627, and *State* v. *Adkins,* 145 Iowa, 671, 124 N. W., 627, 628.

And this court has settled the doctrine once for all in the leading case of *Dent* v. *West Virginia,* 129 U. S., 114, 32 L. Ed., 623, and has adhered to it ever since in numerous cases, notably in *Watson* v. *Maryland,* 218 U. S., 173, 54 L. Ed., 987, *Williams* v. *Arkansas,* 217 U. S., 79, 54 L. Ed., 673, *Hawker* v. *New York,* 170 U. S., 189, 42 L. Ed., 1002, *Reetz* v. *Michigan,* 188 U. S., 505, 47 L. Ed., 563.

Mr. Justice Field said for this court in the *Dent* case (129 U. S., 121, 123, 124, 128—heavy type being ours):

"It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex and condition. * * * The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and can not be arbitrarily taken away from them, any more than their real or personal property can be thus taken. **But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society. The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. * * * The**

nature and extent of the qualifications required must depend primarily upon the judgment of the state as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only when they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his rights to pursue a lawful vocation.

* * * We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. *No one has a right to practice medicine without having the necessary qualifications of learning and skill;* and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the state as competent to judge of his qualifications.

* * * There is nothing of an arbitrary character in the provisions of the statute in question; * * * *it imposes no conditions which can not be readily met;* and it is made enforceable in the mode usual in kindred matters, that is, by regular proceedings adapted to the case.

* * * The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state."

And very recently Mr. Justice Day said for this court in *Watson* v. *Maryland,* 218 U. S., 173, 54 L. Ed., 987 (heavy type being ours):

"It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely con-

cern the public health. **There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine. Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, it is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties.''**

These principles applied to the case at bar clearly show that the Texas statute does not abridge or take away any of those fundamental rights guaranteed by the 14th Amendment to all persons within the jurisdiction of the state. The requirements on which authority to ''practice medicine,'' as defined by that statute, is conditioned are not arbitrary but are eminently appropriate, and are attainable by reasonable study and application. If plaintiff in error does not possess those qualifications he can not complain —the statute treats alike all persons in the same class under like circumstances and conditions, both as to privileges conferred and liabilities imposed. This is not ''class legislation discriminating against some and favoring others''; but ''within the sphere of its operations it affects alike all persons similarly situated'' (*Barbier* v. *Connolly*, 113 U. S., 27, 28 L. Ed., 923, cited in *Williams* v. *Arkansas*, 217 U. S., 79, 90, 54 L. Ed., 673, 678).

But again we emphasize the fact that the record dose not disclose either that plaintiff in error's diploma was refused recognition by the Board of Medical Examiners, after due presentation, nor that he was ever refused the privilege of taking an examina-

tion for a license, nor that he does not in fact possess the requisite qualifications to pass such an examination. *He has never attempted to comply with law and has really suffered no other penalty than an allopath or a homeopath would incur if they followed a similar line of action by practicing without a license or without registration as provided by the statute.*

Nor does the fact that under the Texas statute license "to practice medicine," as defined by the act, may be granted (after examination or otherwise) to "persons who know nothing about medicines" (i. e., drugs) render the statute invalid under Section 1 of the 14th Amendment to the Constitution of the United States.

The question in the case before the bar of this court is not whether the law is a wise law or an ill-advised law. With the wisdom and policy of the statute the Supreme Court of the United States is not concerned—so long as it is reasonable and enacted in good faith and is not merely arbitrary and capricious. The reasonableness of the law was for the consideration and judgment of the legislature of Texas, subject to the above limitation.

Mr. Justice Holmes, delivering the opinion of this court in *Otis* v. *Parker,* 187 U. S., 606, 609, 47 L. Ed., 323, 327, said:

> "While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with

which they disagree. Considerable latitude must be allowed for differences of view, as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*

* * * No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the Fourteenth Amendment became law, as indeed they were in some civilized states."

But can it be said of the Texas statute that it has no possible tendency to protect the community or promote the public welfare—that it is unsuited to its ostensible end?

The contention of plaintiff in error on page 40 of his brief that the issuance of a license to "practice medicine" (as defined by section 13) is arbitrary and oppressive, can not be sustained on the ground of any oppressive effect upon an osteopath as such. For, assuming that the qualifications prescribed by the statute for authority to practice are

reasonably related to the profession of healing and curing and are attainable by reasonable study and application, there is no injustice to an osteopath in the mere fact that the license which he receives from the state is to "practice medicine" (as defined by section 13)—*so long as under that license he is allowed to practice his own particular system of practice* (as provided by section 10).

Plaintiff in error, however, on pages 25 and 40 of his brief attacks the validity of the statute on the ground that it exposes the public to the menace of granting a license to "practice medicine" (as defined by section 13) to persons who are not qualified to administer drugs.

We do not believe that this pretended "menace" is a real one. No one is to be granted a license to practice whose qualifications to practice the science of healing have not been tested in one of the prescribed methods under the act; that is, either under sections 6, 7, 9, or 11. Applicants for examination (as provided in section 7) must be more than twenty-one years of age, of good moral character and graduates of bona-fide reputable medical schools whose course of instruction shall embrace not less than four terms of five months each. Examinations shall be conducted (as provided in section 9) in anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene and medical jurisprudence.

Where is the menace to the commmunity in granting [illegible]nses to practice to persons whose qualifications have been thus tested and approved by the Board of Medical Examiners as to fitness of char-

acter and as to their knowledge "of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind," as also of "those subtle and mysterious influences upon which health and life depend"? Can this court indulge in speculation as to whether it is safe to allow persons thus tested for character, learning and skill to "practice medicine" (as defined in section 13)? Is there so grave a danger of an osteopath undertaking to prescribe and administer drugs —a thing which his training and theory of the healing art tell him *not* to do—or that a homeopath will prescribe drugs usually prescribed only by allopaths —that this court would undertake to hold the statute enacted by the legislative body of the state void on that account?

We believe that there is no such alarming danger as would call for such action on the part of this court under the 14th Amendment. **We believe that the statute is neither unwise nor impolitic. But even did this court disagree with the views of the legislature of the state as to the wisdom and policy of the statute it would not, under settled law, hold it void for that reason.** The 14th Amendment has not taken from the states the police power reserved by them at the time the Constitution was adopted, and the sphere of the legitimate police power is the same under the amendment as without it. The statute in question was enacted by the law-making body of the State of Texas under the police power inherent in that sovereignty. It was enacted in good faith. It is not arbitrary. It is not capricious. It is not unreasonable. On the contrary, a fair construction

of all the provisions of the statute must convince the court that it is general in its operation on the subject and persons to which it relates, and that it fairly secures, or tends to secure, the protection of the community and the promotion of the public welfare.

Defendant in error earnestly insists, therefore, that the act in question (Acts of the 30th Legislature of Texas, 1907, Chapter 123) does not violate the Constitution of the United States, particularly the 14th Amendment thereof; and respectfully urges that the judgment of the Court of Criminal Appeals of the State of Texas be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

No. 165.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

IRA W. COLLINS, PLAINTIFF IN ERROR.

vs.

STATE OF TEXAS, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

The Plaintiff in Error being a physician practicing Osteopathy in the city of El Paso, in El Paso County, Texas, failed to secure his license to so practice, as authorized by the Acts of the Thirtieth Legislature of Texas, Chapter CXXIII, page 224, (1907), and because of his failure to secure the license as provided in said Act, he was arrested on proper complaint and information filed in the County Court of El Paso County. Subsequently he sued out an application for writ of habeas corpus before the County Judge, and upon the hearing of said application he was remanded to

the custody of the Sheriff of El Paso County. Thereupon Plaintiff in Error appealed from the order and judgment of the county court to the Court of Criminal Appeals of Texas, and that court on June 19, 1909, affirmed the judgment of the court below. The case is now before this court on writ of error granted by the Presiding Judge of the Court of Criminal Appeals of Texas.

By his First Assignment of Error in this court, Plaintiff in Error asserts that having established himself in the practice of Osteopathy in the county of El Paso, Texas, prior to the passage of the Act above referred to, to wit: Chapter 123, Act of 1907 (Thirtieth Legislature), and being engaged in the business of said profession at said time, under a diploma from the American School of Osteopathy at Kirksville, Mo., the requirement under said Chapter 123 that he obtain either the verification license mentioned in Section 6 of said Act, or license to practice medicine under Sections 7 to 9 of said Act, was in direct violation of the Fourteenth Amendment to the Constitution of the United States, which declares that "no State may make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;" and that the Court of Criminal Appeals erred in not discharging the relator for said reasons.

It was admitted in the trial court that the Plaintiff in Error was at the time of the filing of the information and complaint, a citizen of the United States, by birth, and a citizen of the State of Texas, and that

he had been a resident of El Paso County, Texas, and a citizen of the city of El Paso, Texas, for six years, practicing in said city of El Paso during all of said time, as a Doctor of Osteopathy. That prior to his going to the city of El Paso in the year 1903, he graduated as a Doctor of Osteopathy after a full two years' course of instruction in the American School of Osteopathy at Kirksville, Mo., and that he received in the spring of 1903 a diploma. That the Plaintiff in Error and other graduates of said school do not use and have never used in their practice in the treatment of diseases of sickness, any drug or medicine, but that their treatment consists, and at all times has consisted, in manipulating scientifically, as taught in said school of Osteopathy, the limbs, muscles, ligaments and bones pressing on the blood supply, so that nature may have free action and the natural blood supply be restored and the diseased condition thus removed.

It was also admitted that the Plaintiff in Error, on or about the second day of September, 1908, treated a patient in the city of El Paso for hay fever, said hay fever being a physicial disease and disorder, and that he charged said patient money therefor.

It was also admitted that at the time Plaintiff in Error so treated said patient he had not registered in the District Clerk's office at El Paso, Texas, the county in which he then and there resided, any authority from the Board of Medical Examiners for the State of Texas for so practicing Osteopathy, and had not registered any certificate of authority from said Board of Medical Examiners for so practicing.

By Section 4 of the Statute of Texas, under consid-

eration, which was in force at the time of the Acts above recited, it is provided that:

> "It shall be unlawful for anyone to practice medicine in any of its branches upon human beings within the limits of this State, who has not registered in the District Clerk's office of the county in which he resides, his authority for so practicing as herein prescribed, together with his age, post-office address, place of birth, school of medicine to which he professes to belong, subscribed and verified by oath, which, if wilfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be endorsed by the District Clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate."

By Section 5 of said Act it is made the duty of the District Clerk to register licenses presented to him.

Section 13 provides that:

> "Any person shall be regarded as practicing medicine within the meaning of this Act, (1) who shall publicly profess to be a physician or surgeon, and who shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury by any system of method, or to effect cures thereof. (2) Or who shall treat or

offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation."

The Court of Criminal Appeals of Texas held in this case that one engaged in practicing Osteopathy, using no medicine or drugs, is engaged in the practice of medicine within the purview of the statute just quoted, and further, that said statute was not in conflict with the Constitution of Texas (Ex parte Collins, 121 S. W., 121). Therefore, we take it that the only question to be considered or determined by this court is whether said statute is in conflict with or in violation of the Constitution of the United States.

THE POWER OF A STATE TO MAKE REASONABLE PROVISIONS FOR DETERMINING THE QUALIFICATIONS OF THOSE ENGAGED IN THE PRACTICE OF MEDICINE, AND PUNISHING THOSE WHO ATTEMPT TO ENGAGE THEREIN IN DEFIANCE OF SUCH STATUTORY PROVISIONS, IS FIRMLY SETTLED BY THE DECISIONS OF THIS COURT.

In the case of Dent vs. West Virginia, 129 U. S., 114, there was involved the validity of a statute of the State of West Virginia, which required every practitioner of medicine in that State to obtain a certificate from the State Board of Health that he was a graduate of a reputable medical college in the school of medicine to which he belonged, or that he had practiced medicine

in the State continuously for a period of ten years prior to the eighth day of March, 1881, or that he had been found upon examination by the board to be qualified to practice medicine in all its departments. The statute under consideration in that case made the practice of or the attempt by any person to practice medicine, surgery or obstetrics in the State, without such certificate (with certain exceptions not necessary to consider here), a misdemeanor, and punishable by fine or imprisonment. Under said statute, Dent was indicted in the State Circuit Court of Preston County, West Virginia, for unlawfully engaging in the practice of medicine in that State, without a diploma, certificate or license therefor as required, and upon trial he was found guilty by the jury. In that case it was shown that the said Dent was engaged in the practice of medicine in West Virginia at the time charged in the indictment and had been so engaged since the year 1876 continuously to the time of the indictment, to wit: In June, 1882, and had during all of said time enjoyed a lucrative practice, publicly professing to be a physician and prescribing for the sick; that he had no certificate as required by the statute. but had a diploma from the American Medical Eclectic College of Cincinnati, Ohio; that he presented said diploma to the members of the Board of Health and asked for a certificate as required by law, but that the said board returned it with their refusal to grant him the certificate asked, because, as they claimed, said college did not come under the term "reputable," as defined by the said Board of Health. It was further admitted in that case that if the said Dent should be prevented from practicing medicine it would be a great

injury to him, as it would deprive him of his only means of supporting himself and family; that at the time of the passage of the Act in 1882 he had not been practicing medicine ten years, but had only been practicing six years.

It was insisted by the Plaintiff in Error in the above case that the statute of West Virginia, by forfeiting his right to continue in the practice of his profession, (1) destroyed his vested rights and deprived him of the estate he had acquired in his profession by years of study, practice, diligence and attention; (2) that it deprived him of the benefit of an established reputation as a practictioner; and (3) that it divested, destroyed and hence deprived him of the value of his invested capital in books, medicines and instruments, and that said statute was unconstitutional and void. The unconstitutionality claimed was the alleged conflict of the statute with the clause of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. This court denied the claims of the Plaintiff in Error and fully sustained the validity of the statute of West Virginia.

The case contains an interesting discussion of the questions involved in the case at bar, and we therefore take the liberty of quoting at length therefrom:

> "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business or profession he may choose, subject only to such restricitions as are imposed upon all per-

sons of like age, sex and condition. This right may in many respects be considered as a distinguishing feature of our republican institutions. Here all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or, as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors, and can not be arbitrarily taken from them any more than their real or personal property can be thus taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of society. The power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure or tend to secure them against the consequences of ignorance and incapacity as well as of deception and fraud. As one means to this end it has been the practice of different States, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely, their possession being generally ascertained upon an examination of parties by competent persons, or inferred from a certificate to them in the form of a diploma or license from an institution established for instruction on the subjects, scientific and otherwise, with which such pursuits have to deal. The nature and extent of the qualifications required must depend prima-

rily upon the judgment of the State as to their necessity. If they are appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty. It is only where they have no relation to such calling or profession, or are unattainable by such reasonable study and application, that they can operate to deprive one of his right to pursue a lawful vocation.

"Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind. The physician must be able to detect readily the presence of disease, and prescribe appropriate remedies for its removal. Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications. Due considerations, therefore, for the protection of society may well induce the State to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified. The same reasons which control in imposing conditions, upon compliance with which

the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or more thorough acquaintance is obtained of the remedial properties of vegetable and mineral substances, or a more accurate knowledge is acquired of the human system and of the agencies by which it is affected. It would not be deemed a matter for serious discussion that a knowledge of the new acquisitions of the profession, as it from time to time advances in its attainments for the relief of the sick and suffering, should be required for continuance in its practice, but for the earnestness with which the Plaintiff in Error insists that, by being compelled to obtain the certificate required, and prevented from continuing in his practice without it, he is deprived of his right and estate in his profession without due process of law. We perceive nothing in the statute which indicates an intention of the Legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill; and the statute only requires that whoever assumes, by offering to the community his services as a physician, that he possesses such learning and skill, shall present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications."

The principles established in the above case were re-affirmed in Hawker vs. New York, 170 U. S., 195.

It is asserted by the Plaintiff in Error herein, that be-

cause he had, prior to the passage of the Act of the Thirtieth Legislature, Chapter 123, Acts of 1907, qualified under the then existing laws of Texas to practice his profession and had established himself in his practice, that the Legislature was without power to deprive him of the right of continuing to so practice. But it is well settled that the State does not, by licensing persons to practice medicine, surrender the authority and power to prescribe additional qualifications for the right to continue such practice. This was the question directly involved and decided in the case of Dent vs. W. Va., supra, and re-affirmed in many decisions of this court.

In Gray vs. Conn., 159 U. S., 74, this court, considering the effect of a statute prescribing additional qualifications for one acting as a pharmacist who already had a license from the State therefor, said:

> "Whatever provisions were prescribed by the law previous to 1890 in the use of spirituous liquors in the medicinal preparations of pharmacists, they do not prevent the subsequent exaction of further conditions which the lawful authority may deem necessary and useful."

See also Foster vs. Police Commissioners, 102 Cal., 483, and State vs. Board of Medical Examiners, 34 Minn., 387.

The case of Reetz vs. Michigan, 188 U. S., 505, involved the validity of a statute of the State of Michigan, directing the appointment of a Board of Registration in medicine, and requiring all persons engaging in the practice of medicine and surgery to obtain from such board a certificate of registration. The statute

further prescribed the conditions upon which such certificate should be granted and forbade under pénalty the practice of medicine or surgery without such certificate. The conditions above referred to were either a satisfactory examination or possession of a diploma from any legally incorporated, regularly established and reputable college of medicine having a certain prescribed course of study. Another provision of the statute was that an applicant should be given a certificate of registration if he should "present sufficient proof within six months after the passage of this Act of his having already been legally registered under Act No. 167, of 1883, as amended in 1887, entitled 'An Act to promote public health.'"

The Plaintiff in Error in the above case was prosecuted and convicted of the violation of said statute, which conviction was affirmed by the Supreme Court of Michigan (127 Mich., 87). The case was before this court upon a writ of error to the Supreme Court of Michigan. This court affirmed the judgment of the court below and held that the power of the State to make reasonable provisions for determining the qualifications of those engaged in the practice of medicine, and punishing those who attempted to engage therein in defiance of such statutory provisions, was not open to question. Citing Dent vs. W. Va., 129 U. S., 114; Hawker vs. New York, 170 U. S., 189, and Burroughs vs. Webster, 150 Ind., 607.

It was insisted by Reetz, Plaintiff in Error in the above case, that, having once engaged in the practice of medicine in Michigan, and having been licensed so to do, he had a right to continue such practice and that the Michigan statute was in the nature of an ex post

facto law. This court overruled said contention, holding that the case of Hawker vs. New York, supra, was decisive upon the question.

We desire to call the court's attention to the similarity of the statute in the case at bar to the statute of Michigan, involved in the above case. The only difference being that the Texas statute is more liberal in its terms. The Texas statute authorizes all persons who were legal practitioners of medicine in the State prior to its passage, to obtain a new license by simply presenting to the board their certificates under the old law, and they were given one year in which to do so.

The Michigan statute involved in the Reetz case required the presentation to the board of the old license within six months after its passage, while the Texas statute allows twelve months for such presentation. So much of the Texas Act as is material upon this point is as follows:

> "Section 6. Within one year after the passage of this Act all legal practitioners of medicine in this State, who, practicing under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received licenses from the State Medical Examining Board of this State, shall present to the Board of Medical Examiners for the State of Texas, documents or legally certified transcripts of documents sufficient to establish the existence and validity of such diplomas or of a valid and existing license heretofore issued by previous examining boards of this State, or exemption existing under any law, and shall receive from said board verification licenses,

which shall be recorded in the district clerk's office in the county in which the licentiates may reside. * * *"

Sections 7 and 9 of said Act provide for the examination and licensing of those persons not entitled under Section 6 to a verification license.

The Plaintiff in Error was a legal practitioner of medicine in the State of Texas, within the meaning of Section 6 above quoted, at the time of the passage of said Act, and could have, by presenting his certificate to the State Medical Board, created by the Act of the Thirtieth Legislature, secured a verification license authorizing him to continue the practice of his profession in the State of Texas, and there is therefore no foundation for the claim that by said Act he was deprived of his property without due process of law.

The case of Meffert vs. State Board of Medical Registration, 66 Kan., 710, 1st L. R. A. (N. S.), 811, it was held that the State in the exercise of its police power in the interest of the health, good government, general welfare and morals of the people, may prescribe the qualifications of persons desiring to practice medicine, and may create a board whose duty it shall be to hear and determine any complaints made against any person holding physician's license and revoke such license for any cause provided for in the statute. It was further held in this case that the Fourteenth Amendment to the Constitution of the United States denying to the State the power to deprive any person of life, liberty or property without due process of law, was not a limitation upon the police power of the State to pass and enforce such laws as in its judgment would

inure to the health, morals and general welfare of the people. This case was affirmed by this court in Meffert vs. Board of Medical Examiners, 195 U. S., 625.

The State in the exercise of its police power has the same right to require that physicians already licensed to practice medicine shall comply with the new and additional qualifications for the right to continue in the practice of their profession that it has to withhold licenses in the first instance. Both Acts are an exercise of the police power. The power exercised and the object of its exercise are in each case identical, viz.: To exclude an incompetent or unworthy person from the practice of medicine.

See State Ex rel Chapman vs. State Medical Examiners, 34 Minn., 387, 26. N. W., 123.

Meffert vs. State Board of Medical Registration, 66 Kan., 710, 1 L. R. A. (N. S.), 811.

The Meffert case, as already stated, was affirmed by the Supreme Court of the United States. (195 U. S., 625.)

State Ex rel Feller vs. State Medical Exeminers, 34 Minn., 391, assumes the correctness of the Chapman case.

There is no vested right to practice either the medical or legal profession, free from supervision and regulation by the State.

Broadwell vs. Illinois, 16 Wall., 130.

Reetz vs. Michigan, 188 U. S., 505.

Hawker vs. New York, 170 U. S., 189.

The Fourteenth Amendment to the Constitution of the United States does not prohibit the State in the exercise of its police power, to pass and enforce such laws as in its judgment will promote the health, morals

and general welfare of the people. Such power is reserved to the State, which has been so recognized by all courts since the adoption of the Amendment.

In People vs. King, 110 N. Y., 418, 1 L. R. A., 293, it is said:

> "But, as the language of the constitutional prohibition implies, life, liberty and property may be justly affected by law, and the statutes abound in examples of legislation limiting or regulating the use of private property, restraining freedom of personal action, or controlling individual conduct, which, by common consent, do not transcend the limitations of the Constitution. This legislation is under what, for lack of a better name, is called the police power of the State—a power incapable of exact definition, but the existence of which is essential to every well-ordered government. By means of this power the Legislature exercises a supervision over matters involving the common weal, and enforces the observance by each individual member of society of the duties which he owes to others and to the community at large. It may be exerted whenever necessary to secure the peace, good order, health, morals and general welfare of the community; and the propriety of its exercise within constitutional limits is purely a matter of legislative discretion, with which the courts can not interfere."

The constitutionality of statutes regulating the admission of members of the various branches of the medical profession has frequently been passed upon by the

courts, and they have been uniformly upheld as a valid exercise of the police power of the State, infringing no provisions of either Federal or State Constitutions.

Dent vs. W. Va., 129 U. S., 114.

People vs. Phippin, 70 Mich., 6.

People vs. Reetz, (Mich., 1901), 86 N. W., 398; (affirmed in Reetz vs. Mich., 188 U. S., 505).

See, also, Vol. 22 Am. & Eng. Ency. of Law, 2nd Ed., p. 780; and a large number of authorities there cited.

It has been specifically held that such statutes do not constitute a taking without due process of law; that they do not infringe the provisions of the Federal Constitution securing to the citizens of each State all the privileges and immunities of citizens in the several States, nor the constitutional prohibition against the abridgment of the privileges and immunities of citizens of the several States, nor that against *ex post facto* laws.)

Vol. 22 Am. & Eng. Enc. of Law, 2nd Ed., p. 781; and authorities there cited.

That such statutes do not infringe the provisions of the Federal Constitution against *ex post facto* laws, see

Hawker vs. New York, 170 U. S., 189.

Eastman vs. State, 109 Ind., 281, 58 Am. Repts., 402.

State vs. Creditor, 44 Kan., 568, 21 Am. St. Rep., 306.

Craig vs. Medical Examiners, 12 Mont., 211.

State vs. Coleman, 64 Ohio State, 377.

The constitutionality of these statutes has also been upheld against the objection that they are an unconstitutional interference with vested rights.

Dent vs. W. Va., 129 U. S., 114.

Allopathic State Board vs. Fowler, 50 La. Ann., 1358.

People vs. Moorman, 86 Mich., 433.

In the case of the State Ex rel Burrows vs. Webster, 150 Ind., 607, it was held that under a statute providing the manner in which a physician holding a license to practice medicine under the preceding law might procure a new license and continue in the practice, the former license was only prima facie evidence of the right to a new one; and further, that an Act making it unlawful to practice medicine without a license and denying to all physicians in the State lawfully engaged in the practice the right to continue such practice until they conform to the requirements of the statute, and restricting the practice of medicine to persons who were able to demonstrate their qualifications to the State Board of Medical Registration and Examination created by the Act, was constitutional, being a proper exercise of the police power of the State.

The same character of statutes have been held constitutional as a proper exercise of the police power of the State in nearly every State of the Union, and in the Supreme Court of the United States. These authorities are collated in State Ex rel Burrows vs. Webster, 150 Ind., pp. 616 and 617.

The Constitution of Texas (Article 16, Section 31), commands the Legislature to enact laws regulating the practice of medicine, and, as we have already shown, it is held by the great weight of authority that this power may be exercised under the police power of the State; and the Fourteenth Amendment to the Constitution of the United States is not an inhibition against the exercise of such power.

In the case of Williams vs. People, 121 Illinois, 87, it is said:

"It is the common exercise of legislative power to prescribe regulations for securing the admission of qualified persons to professions and callings demanding special skill, and nowhere is this undoubted exercise of the police power of the State more wise or salutary, or more imperiously called for than in the practice of medicine. It concerns the preservation of the lives of the people."

See, also, State vs. Examining Board, 32 Minn., 325, 50 Am. Rep., 575.

West Va. vs. Dent, 25 W. Va., 1.

Thompson vs. Staats, 15 W. End. (N. Y.), 395.

Hewitt vs. Charier, 16 Pick. (Mass.), 395.

State vs. Hale, 15 Mo., 606.

Bibber vs. Simpson, 50 Me., 181.

Dankworth vs. State, 136 S. W., 788.

By his Second Assignment of Error, Plaintiff in Error asserts that said Chapter 123 of the Acts of the Thirtieth Legislature of Texas, if it applies to him, under the facts of this case, as an Osteopath, or to any Osteopath, is in violation of the Fourteenth Amendment to the Constitution of the United States, (1) because it discriminates in favor of nurses who practice only nursing; (2) because it discriminates in favor of masseurs, who, in their particular sphere of labor, it is asserted, treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body, and charge therefor money or other compensation; and (3) because it discriminates in favor of druggists, who, it is asserted, prescribe remedies and charge therefor; and that for said reasons the Court of Criminal Appeals erred in not discharging him from custody upon the final hearing.

THE LEGISLATURE OF THE STATE CLEARLY HAS AUTHORITY TO PRESCRIBE THE REGULATIONS AND CONDITIONS UPON WHICH PERSONS SHALL BE ALLOWED TO PRACTICE MEDICINE IN THE STATE, AND IT IS NOT BOUND TO IMPOSE THE SAME REGULATIONS AND CONDITIONS UPON NURSES, NOR UPON THE PRACTICE OF NURSING, AND THE EXEMPTION OF NURSES FROM THE STATUTE REGULATING THE PRACTICE OF MEDICINE IS NOT IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DENYING TO THE STATE THE RIGHT TO DEPRIVE ANY PERSON OF PROPERTY WITHOUT DUE PROCESS OF LAW OR THE RIGHT TO DENY ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

The Plaintiff in Error insists that the statute under consideration is void as to persons engaged in the practice of Osteopathy, because it exempts nurses who practice only nursing, but we do not think that the claim is well founded.

We have not his brief before us, but presume that the objection intended to be made is that the statute provides for an unreasonable and unjust classification. The statute, however, we think is clearly not open to such objection.

In the exercise of the police power there must needs be a considerable discretion vested in the Legislature whereby some people have rights or suffer burdens that

others do not. The Legislature has the undoubted right to make classifications and to prescribe different rules for the different classes, and the statute is not open to objection if it applies to all persons coming within a class, provided, of course, the classification is not wholly arbitrary and capricious.

We cheerfully concede that the Legislature has no power to form classes that arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest on some reasonable ground of difference; but we insist that the placing of nurses in a different class from persons practicing medicine is a natural and reasonable classification. This identical question was raised in the case of Parks vs. State of Indiana, 59 L. R. A., 190, and the court held that a statute of Indiana prescribing conditions for the admission to the practice of medicine was not invalid because it exempted nurses. In this same case it was held that the lines of employment of the optician and that of the physician are so diverse as to raise no question as to the power of the Legislature to discriminate between them.

The objects and purposes of statutes regulating the practice of medicine are to protect the sick and suffering and the community at large against the ignorant and unlearned who hold themselves out as being possessed of peculiar skill in the treatment of diseases; from holding themselves out to the world as physicians and surgeons without having acquired the proper knowledge of the human system or diseases and ailments to which it is subject. There can not be a like reason for requiring nurses to be trained in the practice of medicine, for they do not hold themselves out as such; they do not pretend to be able to diagnose and treat diseases of the human

system. The function of the nurse is to carry out the instructions of the physician and to care for the sick patient under the supervision and direction of the physician in charge. The reasons for the exemption of nurses from the operation of the statute are so apparent that we deem further argument useless and unnecessary.

It is next insisted by the Plaintiff in Error that the statute under consideration is void as discriminating in favor of masseurs, who, it is alleged, in their particular spheres of labor, treat diseases and disorders and injuries by manipulating, rubbing and kneading the human body and charging therefor money and other compensation.

The answer to this argument is that the statute makes no such discrimination and no such exemption as is claimed.

It is provided in the statute that it shall not apply "to masseurs in their particular sphere of labor, who publicly represent themselves as such." This exemption does not authorize masseurs to treat persons suffering with any disease or physical deformity or disorder and charge therefor, and if they should attempt to do so they would clearly violate Section 13 of said Act. The Act makes it an offense to practice medicine without a license, and declares in Section 13 that any person shall be regarded as practicing medicine who shall publicly profess to be a physician or surgeon, and shall treat or offer to treat any disease or disorder by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation.

Under said Act it has been held by the Court of Crim-

inal Appeals of Texas, which is the highest court in Texas, having jurisdiction in such cases, that while said Act does not apply to masseurs in their particular sphere of labor who publicly represent themselves as such, yet a masseur who treats or offers to treat diseases or disorders, mental or physical, and attempts to effect a cure thereof, and charges compensation therefor without having registered and filed a certificate authorizing him to practice medicine, is guilty of a violation of the Act.

See Dankworth vs. State, 136 S. W., 788.
To the same effect see:
Newman vs. State, 124 S. W., 956.
Newman vs. State, 134 S. W., 688.

It is next insisted that the statute under consideration is void, because of an exemption in favor of druggists who, it is claimed, prescribe remedies and charge therefor.

The answer to this objection likewise is that the statute does not authorize druggists to prescribe remedies and charge therefor, unless they are legally qualified practitioners of medicine.

By subdivision 2 of Section 13 of the Act under consideration, it is provided that any person shall be regarded as practicing medicine within the meaning of the Act "who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation."

This provision of the statute applies to licensed druggists as well as to others, and unless druggists are also

legally qualified practitioners of medicine, they can not treat or offer to treat any disease or disorder, mental or physical, or physical deformity, and charge therefor. The statute is not open to the construction that druggists are permitted to practice medicine and charge for their services. And therefore it is not subject to the objection that it discriminates in favor of druggists.

By his Third Assignment of Error, Plaintiff in Error asserts that if said Chapter 123 of the Acts of 1907 (Thirtieth Legislature of Texas) applies to an Osteopath who practices only as such, or applies to him under the facts in this case, then Section 6 of said Act discriminates against him in providing for the issuance of a verification license to legal practitioners of medicine who were practicing under the provisions of previous laws, or under diplomas of reputable and legal college of medicine, and that having been at the time said Act was passed, and having been ever since it was passed, a practitioner of Osteopathy, there is, so it is claimed, no provision in said law for the issuance of verification licenses to him or other Osteopaths practicing osteopathy in the State of Texas, and that on account of such alleged discrimination, it is claimed that said Section 6 of Chapter 123 violates the Fourteenth Amendment to the Constitution of the United States.

This statute is not open to the construction that it does not authorize the issuance of verification licenses to Osteopaths.

The statute authorized the issuance of verification licenses to all legal practitioners of medicine in the State of Texas who had qualified under the laws in force before its enactment. The practice of osteopathy was regarded by the Legislature as the practice of a particular

school of medicine, and the courts of Texas have several times held that practitioners of osteopathy were legal practitioners of medicine.

It was held by the Court of Criminal Appeals in the case at bar that the word "medicine" as used in the Constitution of Texas, embraces the art of healing by different scientific or supposedly scientific methods, the art of perfecting cures or alleviating diseases, and remedying as far as possible results of violence and accident, and that it was broad enough to include any method that was supposed to possess curative powers, and authorized the passage of the Act of the Thirtieth Legislature (Chapter 123, Acts of 1907), requiring physicians and surgeons, including Osteopaths, to obtain a license to engage in the practice of their profession.

The same holding was made by the Court of Criminal Appeals of Texas in the case of Newman vs. State, 124 S. W., 957. It is clear from the Act itself that the Legislature regarded the practice of osteopathy as the practice of medicine. Section 13, as already shown, provides that any person shall be regarded as practicing medicine within the meaning of the Act who shall publicly profess to be a physician or surgeon, and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof.

By Section 10 of said Act it is provided that nothing therein should be construed so as to discriminate against any particular school or system of medical practice. The practical construction given to the Act by the Board of Medical Examiners of Texas is in line with the above decisions, and persons who were practicing Osteopathy in the State of Texas prior to the enactment of the statute in question, were given one

year in which to present their licenses under former laws or diplomas, and secure from the Medical Board verification licenses authorizing them to continue in the practice of their profession. Plaintiff in Error and all other Osteopaths in this State were invited to present their certificates to the Medical Board and secure authority to continue in the practice of their profession.

In the case of People vs. Aucult, 189 N. Y., 517, in treating a statute similar to the Texas Act, it is said that "to confine the definition of the words 'practice medicine' to the mere administration of drugs or the use of surgical instruments would be to eliminate the cornerstone of successful medical practice, viz.: the diagonsis. It would rule out of the profession those great physicians whose work was confined to diagnosis, who leave to all others the details of practice. Section 146 of the Public Laws (Laws of 1893), Chapter 661, as amended by the laws of 1901, Chapter 646, provides that persons desiring to practice must pass a regent's examination made up of suitable questions for thorough examination in anatomy, surgery, obstetrics, hygiene, chemistry and therapeutics, including practice and materia medica (and here we may say that this section corresponds with Section 9 of the Texas Act). Diagnosis would therefore seem to be an integral part of both the study and practice of medicine so recognized by the law as well as common sense. The correct determination of what the trouble is must be the first step toward the cure thereof."

Fourth.—Plaintiff in Error's Fourth and Fifth Assignments of Error raise practically the same question, and we will, therefore, consider them together. In said

assignments it is urged that if Section 13 of Chapter 123, Acts of 1907 (Thirtieth Legislature of Texas), is applicable to him under the facts in this case or to any one simply practicing osteopathy, then said statute is in violation of the Fourteenth Amendment to the Constitution of the United States, in that it is alleged to discriminate against an Osteopath, and against the Plaintiff in Error in requiring that he should have a diploma from a bona fide medical school before being allowed to present himself for examination before the Board of Medical Examiners for a license to practice, and in requiring him to accept a license to practice medicine, and to discriminate in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine.

The statute under consideration does not discriminate in favor of or against any person or in favor of or against any school of medicine. The Act provides that all applicants for license to practice medicine in the State of Texas, who were not entitled to licenses under Section 6 thereof (through verification), must successfully pass an examination before the Board of Medical Examiners established by the Act, and all persons possessing the requisite qualifications may go before the board and stand the examination required, which is the same for all persons. The statute makes no distinction as to schools of medicine. Allopaths, Homeopaths, Osteopaths and all others are required to be examined upon the same subjects and to accept the same license.

By Section 10 of said Act it is provided that "nothing in this Act shall be construed as to discriminate against any particular school or system of medical practice."

As already shown, it has been held by the courts of Texas that the practice of Osteopathy constitutes the practice of medicine, and the State has the authority to prescribe the conditions and restrictions subject to which persons shall be allowed to practice medicine in the State, whether they desire to practice as Osteopaths, Homeopaths or Allopaths.

For hundreds of years the matter of the safeguarding of health has been a matter of police control. If a person holds himself out to the community as skilled in the science of healing and seeks the opportunity to exercise the skill he claims to possess, his business becomes imbued with public character, and he is, therefore, subject to reasonable regulation in its prosecution.

The statute in question in this case, it is claimed, is an attempt to determine a question of science and control the personal conduct of the citizen without regard to his opinion, and in a matter in which the public is in nowise concerned. On the contrary, we think the matter is one of very great concern, and that the Legislature is the appropriate tribunal to determine the degree of learning that those who gain a livelihood by seeking to relieve the bodily ailments of others should possess. The Legislature has a right to determine the degree of learning that an applicant for examination shall possess in order to secure a high degree of learning and efficiency in the licensed practitioner of medicine, which is so essential to the safety of the people.

As stated by this court in the case of Dent vs. West Virginia, supra, "the physician must be able to detect readily the presence of disease and prescribe appropriate remedies for its removal. Everyone may have occasion to consult him, but comparatively few can

judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license issued by an authority competent to judge in that respect that he possesses the requisite qualifications." Is it not competent for the Legislature to prescribe that examinations of applicants for license to practice medicine, even though said applicants do not intend to practice through the administration of drugs, shall be conducted on the scientific branches of medicine, and shall include anatomy, physiology, chemistry, histology, pathology, physical diagnosis, surgery, obstetrics, gynecology, hygiene and medical jurisprudence? We think so, and this is exactly what the statute requires.

In the case of Little vs. State of Nebraska, 51 L. R. A., 717, it is held that one who practices what is known as osteopathy is a practioner of medicine. In this case it was said that the object of statutes regulating the practice of medicine was to protect the afflicted from the pretensions of the ignorant and the avaricious, no matter whether the persons pretending to heal bodily or mental ailments do or do not profess to follow beaten paths and established usages. In the course of the opinion the court said:

> "It is argued that Osteopaths do not profess to treat any physical or mental ailment, but that they merely seek to remove the cause of such ailment or disease, and therefore do not come within the definition mentioned. The writer is not deeply versed in the theory of the healing art, but he apprehends that all physicians have the same object in view, namely, the restoring of the person to sound bodily

or mental condition, and whether they profess to attack the malady or its cause they are treating the ailment as the word is popularly understood."

In the case of the State of Ohio vs. Marble, 70 L. R. A., 835, it was held that legislation prohibiting anyone from treating a disease for a fee, excepting such persons as have prescribed qualifications, is a valid exercise of the police power of the State and constitutional; and further, that the giving of Christian Science treatment for a fee for the cure of disease is practicing medicine within the meaning of the statutes regulating such practice in the State of Ohio. See, also, Parks vs. State, 59 L. R. A., 191.

By a statute of Ohio, it was provided that a person should be regarded as practicing medicine who should "for a fee prescribe, direct or recommend for the use of any person, any drug or medicine, or other agency for the treatment, cure or relief of any wounds, fracture or bodily injury, infirmity or disease."

Construing this statute in the case of the State of Ohio vs. Gravett, 65 Ohio State, 289, 55 L. R. A., 791, the Supreme Court of that State held that "the system of rubbing and kneading the body, commonly known as osteopathy," comprehended the practice of medicine.

It was further held in this case that one who had an established practice in the healing of diseases might be required to conform to such reasonable standards respecting the qualifications therefor as the General Assembly might prescribe, having in view the public health and welfare.

In State vs. Edmonds, 127 Iowa, 333, it was held that one who professes to cure diseases by dieting his

patients, causing them to take certain exercises and to wear glasses or spectacles which are furnished, was within the meaning of a statute requiring the licensing of physicians and defining a physician as one who publicly professed to be a physician and assumed the duties or who made a practice of prescribing and furnishing medicines for the sick or who publicly professed to cure or heal.

In the State vs. Wilhite, 132 Iowa, 226, 11 Am. & Eng. Ane. Cases, 180, it was held that one who, in order to give nature a chance, proposed to "stop the leaks in the nervous system and repair the damages done by methodical rest and diatetics," announcing himself as the "master mechanic of the human body," and as attaining better results than any other system, publishing his card as "Doctor of Neurology and Ophthalmology," and who advised patients how to care for themselves so that nature might effect a cure, was properly found guilty of practicing medicine without a license within the meaning of the statute of Iowa providing that any person should be held as practicing medicine or to be a physician who should publicly profess to be a physician and assume the duties, or who should make a practice of prescribing medicine for the sick, or who should publicly profess to cure or heal.

In the case of State vs. Heath, 125 Iowa, 585, the Supreme Court of Iowa in upholding the Medical Act of that State, said:

> "The power of the State to prescribe such restrictions and regulations in the practice of medicine as, in the judgment of the Legislature, shall protect the people from the consequences of ignorance or incapacity, as well as deception and

fraud, has been vindicated too often to require citation of authority. * * * The statutes do not attempt to discriminate between different schools of medicine or systems for the cure of diseases. No method of attempting to heal the sick, however occult, is prohibited. All that the law exacts is that, whatever the system, the practitioner shall be possessed of a certificate from the State Board of Medical Examiners. This excludes no one from the profession, but requires all to attain reasonable efficiency in certain subjects essential to the apprehension of physicial conditions to be affected by treatment. The object is not to make any particular mode of effecting the cure unlawful, but simply to protect the community from the evils of empiricism. Often the individual alone suffers from the want of proper attention, but, in cases of contagious or infectious diseases the entire community may be endangered. In no profession, or calling are the people more easily or readily imposed upon."

What was said by the Supreme Court of Iowa in the case just quoted from, applies with equal force in the case at bar. The Texas statute, like the Iowa statute, does not discriminate in favor of or against any method of treatment of diseases. The Homeopath is allowed to treat diseases according to methods approved by that school of medicine. The Osteopath is permitted to treat patients suffering with diseases and disorders according to the Osteopathic method, and the Allopath according to methods approved by the Allopathic schools. All that the statute requires is that persons desiring to engage in the practice of healing the sick and administer-

ing to the injured shall possess certain prescribed qualifications. Surely it is not unreasonable to demand of everyone who professes to treat disease some knowledge of the disease, its origin, its anatomical and physiological features, and its causative relations and the effects of drugs. At any rate, the State, in order to guard the people, has the right to exact such knowledge, and this is the effect of the Texas statute and its only effect.

For the reasons above stated, it is respectfully submitted that the Texas statute under consideration is a valid exercise of the police power of the State and does not deprive the Plaintiff in Error of any right guaranteed by the Federal Constitution.

We therefore respectfully ask that the judgment of the Court of Criminal Appeals of Texas be in all things affirmed.

Respectfully submitted,

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Attorneys for the State of Texas, Defendant in Error.

APPENDIX A.

TEXAS STATUTE REGULATING PRACTICE OF MEDICINE—CHAPTER 123, ACTS 1907.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That a board, to be known as the Board of Medical Examiners for the State of Texas, is hereby established. Said board shall consist of eleven men learned in medicine, legal and active practitioners in the State of Texas, who shall have resided and practiced medicine in this State under a diploma from a legal and reputable college of medicine of the school to which said practitioner shall belong for more than three years prior to their appointment, and no one school shall have a majority representation on said board. Said board shall be appointed by the Governor of this State within ninety days after this Act shall become effective and biennially thereafter within ninety days after his inauguration and the term of office of its members shall be two years, or until their successors shall be appointed and qualified. No member of said board shall be a stockholder or a member of the faculty or a board of trustees of any medical school. Vacancies occurring in the board shall be filled by the Governor. The word "medicine" as used in this section shall have the same meaning and scope as given to it in Section 13 of this Act.

SEC. 2. The members of said board shall qualify by taking the oath of office before a notary public or other officer empowered to administer oaths in the county in which each shall respectively reside. At the first meeting of said board after each biennial appointment the

board shall elect a president, vice president and secretary-treasurer. Six members shall constitute a quorum. Regular meetings shall be held at least twice a year, at such times and places as shall be deemed most convenient for applicants. Due notice of such meeting shall be given by publication in such papers as may be selected by the board. Special meetings may be held upon a call of three members of the board. The board may prescribe rules, regulations and by-laws, in harmony with the provisions of this act, for its own proceedings and government for the examination of applicants for the practice of medicine and obstetrics. Said board, or any member, shall have power to administer oaths for all purposes required in the discharge of its duties, and to adopt a seal to be affixed to all of its official documents.

SEC. 3. The Board of Examiners shall preserve a record of its proceedings in a book kept for that purpose, showing name, age, place and duration of residence of each applicant, time spent in medical study in respective medical schools, and the year and school from which degrees were granted; said register shall also show whether applicants were rejected or licensed, and shall be prima facie evidence of all matters contained therein. The secretary of the board shall, on March 1 of each year, transmit an official copy of said register to the Secretary of State for permanent record, certified copy of which, with hand and seal of the secretary of said board, or Secretary of State, shall be admitted in evidence in all courts.

SEC. 4. From and after the passage of this act it shall be unlawful for any one to practice medicine in any of its branches upon human beings within the limits of this State who has not registered in the district clerk's

office of the county in which he resides his authority for so practicing, as herein prescribed, together with his age, postoffice address, place of birth, school of practice to which he professes to belong, subscribed and verified by oath, which, if wilfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be endorsed by the district clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate.

SEC. 5. It is hereby made the duty of the district clerk of each county in this State to purchase a book of suitable size, to be known as the "Medical Register" of such county, and set apart one full page for the registration of each physician, and to record in the same the name and record of each practitioner who presents a certificate from the State Board of Examiners, issued under this act. The clerk shall receive the sum of one dollar from each physician so registered, which shall be his full compensation for all duties required under this act. When any physician shall die or remove from the county, or have his license revoked, it shall be the duty of said clerk to make a note of facts at the bottom of the page as closing the record. On the first day of January in each year said clerk shall, on request of the board, certify to the office of the State Board of Medical Examiners a correct list of the physicians then registered in the county, together with such other information as said board may require. Any district clerk, upon conviction of knowingly violating any of the provisions of

this act, shall be fined not more than fifty dollars. A copy from the medical register pertaining to any person certified to by said clerk under the seal of said court; also a certificate issued by said officer certifying that any person named has or has not registered in said office as required by this act, shall be admitted as evidence in all trial courts.

SEC. 6. Within one year after the passage of this act all legal practitioners of medicine in this State, who, practicing under the provisions of previous laws, or under diploma of a reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State, shall present to the Board of Medical Examiners for the State of Texas documents, or legally certified transcripts of documents, sufficient to establish the existence and validity of such diplomas or of the valid and existing license heretofore issued by previous examining boards of this State, or exemption existing under any law, and shall receive from said board verification license, which shall be recorded in the district clerk's office in the county in which the licentiates may reside. Such verification license shall be issued for a fee of fifty cents to all practitioners who have not already received a license from the State Board of Medical Examiners of this State. It is especially provided that those whose claims to State licenses rest upon diplomas from medical colleges recorded from January 1, 1891, to July 9, 1901, shall present to the State Board of Medical Examiners satisfactory evidence that their diplomas were issued from bona fide medical colleges of reputable standing, which shall be decided by the Board of Medical Examiners before they are entitled to a certificate from said

board. This board may, at its discretion, arrange for reciprocity in license with the authorities of other States and Territories having requirements equal to those established by this act. License may be granted applicants for license under such reciprocity on payment of twenty dollars.

SEC. 7. All applicants for license to practice medicine in this State who are not licensed under the provisions of the previous section must successfully pass an examination before the Board of Medical Examiners established by this act. Applicants to be eligible for examination must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character and graduates of bona fide, reputable medical schools. Such schools shall be considered reputable within the meaning of this act whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States whose course of instruction shall embrace not less than four terms of five months each. Application for examination must be made in writing under affidavit to the secretary of the board, on forms prepared by the board, accompanied by a fee of fifteen dollars; except when an applicant desires to practice obstetrics alone the fee shall be five dollars. Such applicants shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the State of Texas, upon proper application, shall be examined by the board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or

hold themselves out to the public as so practicing. In case any applicant, because of failure to pass examination, be refused a license, he or she shall, after one year, be permitted to take a second examination without an additional fee.

SEC. 8. The fund realized from the aforesaid fees shall be applied first to the payment of necessary expenses of the Board of Examiners; any remaining funds shall be applied by the order of the board to compensating members of the board in proportion to their labors.

SEC. 9. All examinations shall be conducted in writing and in such manner as shall be entirely fair and impartial to all individuals and every school of medicine, the applicants being known by numbers, without names or other methods of identification on examination papers by which members of the board may be able to identify such papers, until after the applicants have been granted license or rejected. Examinations shall be conducted on the scientific branches of medicine only, and shall include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. Upon satisfactory examination under the rules of the board, applicants shall be granted licenses to practice medicine. All questions and answers, with grades attached, shall be preserved for one year. All applicants examined at the same time shall be given identical questions in each of the above branches. All certificates shall be attested by the seal and signed by all members of the board, or a quorum thereof.

SEC. 10. Nothing in this act shall be construed as to discriminate against any particular school or system of medical practice. This act shall not apply to dentists

legally qualified and registered under the laws of this State who confine their practice strictly to dentistry; nor to nurses who practice only nursing; nor to masseurs, in their particular sphere of labor, who publicly represent themselves as such; nor to commissioned or contract surgeons of the United States Army, Navy or Public Health and Marine Hospital Service, in the performance of their duties, but such shall not engage in private practice without license from the Board of Medical Examiners; nor to legally qualified physicians of other States called in consultation, but who do not open offices or appoint places in this State where patients may be met or called to see. This act shall be so construed as to apply to persons other than licensed druggists of this State not pretending to be physicians, who offer for sale on the streets or other public places remedies which they recommend for the cure of disease.

SEC. 11. The State Board of Medical Examiners may refuse to admit persons to its examinations or to issue the certificate provided for in this act for any of the following causes:

First. The presentation to the board of any license, certificate or diploma which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination.

Second. Conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring, or aiding or abetting the procuring of a criminal abortion.

Third. Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public; or for habits of intemperance or drug addition calculated to endanger the lives of patients; provided,

that any applicant who may be refused admittance to examination before said board shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside.

SEC. 12. The right herein to practice medicine in this State may be revoked by any court of competent jurisdiction, upon proof of the violation of the law in any respect in regard thereto, or for any cause for which the State Board of Medical Examiners is authorized to refuse to admit persons to its examinations as provided in Section 11 of this Act; and it shall be the duty of the several district and county attorneys of this State to file and prosecute appropriate judicial proceedings in the name of the State, on request of any member of said board.

SEC. 13. Any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon and shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof.

(2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation.

SEC. 14. Any person practicing medicine in this State in violation of the provisions of this act shall, upon conviction thereof, be fined in any sum not less than $50 nor more than $500, and by imprisonment in the county jail for a term not exceeding six months, and each day of such violation shall constitute a separate of-

fense, and in no such case shall the violator be entitled to recover anything for the services rendered.

SEC. 15. All certificates heretofore issued by any Board of Medical Examiners in this State under any former law shall be and continue in full force and effect for one year after this act shall take effect, but not afterward, and any person who may, when this act shall take effect, be practicing medicine within this State under the provisions of existing laws or under any exception contained therein, but without license, may, for one year thereafter, but no longer, continue in such practice, without license; and all such certificates and all such rights to practice medicine shall be in all respects subject to the provisions of this act as though isued or acquired under its provisions.

SEC. 16. The terms "physician" and "surgeon" as used in this act shall be construed as synonymous, and the terms "practitioners" and "practitioners of medicine" and "practice of medicine" as used in this act shall be construed to refer to and include physicians and surgeons.

SEC. 17. All laws and parts of laws in conflict with the provisions of this act be and the same are hereby repealed.

SEC. 18. The fact that there is now no law properly regulating the practice of medicine in this State creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and the same is hereby suspended, and that this act take effect and be in force from and after its passage, and it is so enacted.

Approved April 17, 1907.

APPENDIX B.

Opinion.

Ex parte Ira W. Collins.

From El Paso County.

Relator, being a physician, practicing osteopathy, in the City of El Paso, in El Paso County, failed to secure his license to so practice as had been authorized by the acts of the Thirtieth Legislature, Chapter CXXIII, page 224. Upon failing to secure the license as provided in said act he was arrested on proper complaint and information filed in the county court of El Paso county, and sued out an application for writ of habeas corpus before the County Judge, and upon the hearing of said application relator was remanded to the custody of the sheriff of El Paso County.

The information, which in all respects is in conformity with the affidavit, is as follows: "W. W. Bridgers, County Attorney of the County of El Paso, State of Texas, presents to the County Court in and for said County, at its January term, A. D. 1909, that on or about the second day of September, A. D. 1908, and before the filing of this information, in said County of El Paso, State of Texas, Ira W. Collins, who was then and there a resident of said County of El Paso and State of Texas, did then and there practice medicine upon human beings within the limits of the State of Texas, and County of El Paso, without authority of law, to wit: Did then and there in the manner hereinbefore and hereinafter stated, unlawfully treat a physical disease and disorder, to wit: Did then and there unlawfully treat Julia Ballinger, a human being, for hay fe-

ver, said hay fever being a physicial disease and disorder, and did charge the said Julia Ballinger therefor, directly, money the value and amount of which is to the County Attorney unknown, said treatment being given in the capacity of a physician and doctor, under the system and branch of medicine called osteopathy, by means of a system of doctoring and physical treatment
36 called 'Osteopathy,' which treatment consists and did then and there consist in manipulating scientifically the limbs, muscles, ligaments and bones of the human body and of the said Julia Ballinger, which pressed upon the nerves of the blood supply so that nature might have free action, the natural blood supply be restored, and the diseased condition thus removed so unlawfully treating in the County of El Paso, State of Texas, in which the said Ira W. Collins then and there resided, all of which said treatment was given in violation of the provisions of Chapter CXXIII, Acts of the 30th Legislature of the State of Texas, without having first registered in the District Clerk's Office of El Paso County, Texas, the County in which he, the said Ira W. Collins, then and there resided, his authority from the Board of Medical Examiners for the State of Texas for so practicing, together with his age, postoffice address, place of birth, school of practice to which he then and there professed to belong, subscribed and verified by oath, as prescribed and required by the provisions of Chapter CXXIII of the General Laws of the State of Texas, Acts of the 30th Legislature of Texas, page 224 et seq., and against the peace and dignity of the State."

The evidence in the case as adduced upon the trial of the writ of habeas corpus substantiated every allegation in the information, and upon this showing the relator

demands his discharge on the ground that the act is unconstitutional, which provides that an osteopath should pay a license, because the evidence shows that the relator used no medicine or drugs to relieve the patient, therefore, there was no evidence from which the court could conclude the relator should be held in custody upon a charge of practicing medicine without a license. Section 13 of the Act of the Thirtieth Legislature, above cited, reads as follows: "Any person shall be regarded as practicing medicine within the meaning of this act (1) who shall publicly profess to be a physician or surgeon, and shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof. (2) Or who shall
37 treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." We hold that the court was correct in his decision, and that the statute expressly authorized the court in remanding relator, and that the statute in all respects is constitutional.

Relator further insists that Section 31 of Article 16 of the Constitution, which says that the Legislature may pass laws prescribing the qualifications of practitioners of medicine in this State, and punish persons for malpractice, but no preference shall ever be given by law to any schol of medicine, limits the power of the Legislature in authorizing the licensing of practicioners to practitioners of medicine, and that in view of the fact that relator in practicing osteopathy uses no medicine that, therefore, relator does not come within the provisions

of the act. As we understand relator in his brief and argument, he concedes that the statute is broad enough to cover his offense, but that the constitutional provision just cited limits the power of the Legislature to the regulation of the practice of medicine, and that osteopathy is not practicing medicine. The Constitution when it demands the regulation of the practice of medicine, was not attempting to say that the Legislature was limited to any mode or method of healing in order to regulate it, but the word "medicine" used in the Constitution means the art of healing by whatever scientific or supposedly scientific method may be used. It means the art of preventing, curing or alleviating diseases and remedying, as far as possible, results of violence and accident. It further means something which is supposed to possess, or some method which is supposed to possess curative power, but if this definition of medicine is not correct, as stated in the Constitution, yet there is no limitation upon the power of the Legislature in said provision of the Constitution which inhibits the Legislature of this State under its police power to prevent any one practicing any species or character of remedy to cure any real or supposed ill that the body has or is subject to, for pay. Acts with somewhat similar provisions to the Acts of the 30th Legislature now
38 under consideration were held constitutional by the Supreme Court of this State in the case of Dowell v. McBride, 92 Texas, 239; also by this court in the case of Logan v. State, 5 Tex. Cr. App., 306. So we hold that osteopathy is one of the methods of curing the ills to which human flesh is heir, and is one of the methods of curing covered by the act of the 30th Legislature. In other words, in order for one in this

State to practice osteopathy for pay, he must secure a license, as provided for by the act of the 30th Legislature. This relator did not do. We accordingly hold that he must be remanded to the custody of the sheriff of El Paso County, where he will be called upon to answer the complaint and information relied upon in this case.

The judgment is accordingly affirmed.

BROOKS, Judge.

(Delivered June 19, 1909.)

Supreme Court, U. S.
FILED
JAN 22 1912
JAMES H. McKENNEY,
Clerk

IN THE

Supreme Court of the United States

No. 161.

Ira W. Collins, *Plaintiff in Error*,

vs.

The State of Texas, *Defendant in Error*.

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

SUPPLEMENTAL ARGUMENT FOR PLAINTIFF IN ERROR.

Maxwell Patterson,
Jo. F. Worsham,
Attorneys for Ira W. Collins, Plaintiff in Error.

IN THE

Supreme Court of the United States

No. 165.

IRA W. COLLINS, *Plaintiff in Error.*

vs.

THE STATE OF TEXAS, *Defendant in Error.*

IN ERROR TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

SUPPLEMENTAL ARGUMENT FOR PLAINTIFF IN ERROR.

We submit that counsel for the State in the two briefs filed have argued almost altogether a point that is not involved in th' case.

The relator was not complained of nor arrested for holding himself out as a practitioner of medicine or publicly professing to be a physician as is prohibited by the first sub-

division of Sec. 13 of Chap. 123 of the Acts of 1907 (Texas), but for the alleged offense of doing the one single act of treating a woman for hay-fever by an Osteopathic method for pay (See Pr. Trans., p. 4). In our brief heretofore filed we have tried to make this very clear and we urged the following proposition, viz.: The second subdivision of said Section 13 is void because the Legislature would have no power to declare that a single treatment of any ailment for pay by such a method by any person who is not a graduate of a medical college is a crime. We think we have shown in our brief, being supported by very respectable authorities, that this proposition is a sound one. We do not believe that the argument made by the Supreme Court of North Carolina in State vs. Biggs, 46 S. E., p. 401, upon this point has been or can be answered.

We also made the point that as the relator was in 1907, and had been for several years engaged in the profession of Osteopathy, the Legislature would have no right to discriminate against him with respect to the verification license mentioned in Sec. 6 of the act, and we went further and said, as we now say: As Osteopathy is a method of healing (being covered by the declaration of subdivision 2 of said Sec. 13, which covers every act that might be done for the relief of human suffering for pay) inasmuch as it was shown that relator was a practitioner of Osteopathy (recognized as a lawful calling several years before the act was passed), having a valuable right in his profession and established business the Legislature had no right to require him to secure a diploma from a medical college and stand an examination in the scientific branches of medicine (and become a doctor of medicine) before he could continue to follow such calling.

We are not arguing in this case the question as to what is or what is not "medicine," but the question "what is the

practice of medicine?" This law of 1907 purports to control "the practice of medicine," and we maintain that it is not only objectionable but absolutely vicious in arbitrarily declaring that any single act done for the relief of human suffering for pay without a diploma from a medical college is the practice of medicine and a crime.

When this law is unmasked it is evident to any one that it was gotten up, not for the protection of the public against quacks and impostors, but was gotten up for the benefit of the medical fraternity.

It purports to deal with the matter of the "practice of medicine" and it is now argued in support of the law that the practice of medicine means the practice of any method of healing. If this is true the law ought to be reasonable and not arbitrary, and besides this any one who adopts the "practice" of any method of healing ought to have a fair show. But the act says you cannot do any act or practice any method of healing unless you first present yourself before the Board of Medical Examiners and secure a license (not to practice any particular act of healing, but to practice medicine), and you must have a diploma from a *bona fide* reputable *medical* school before you can present yourself for a license—a *bona fide* reputable *medical* school being defined in the act as one whose entrance requirements and course of instruction are as high as those adopted by the better class of medical schools of the United States (the course to consist of at least four terms of five months each). Here counsel for the State say that a medical school does not mean a school teaching its graduates about the use of medicines, but means a school which teaches any kind of healing. Are we to understand then that there are schools turning out doctors of medicine who know nothing about medicines?

Every school in the United States issuing such diplomas

that calls itself or is called a medical school teaches the practice of medicine, that is, the administration and use of medicines, in the treatment of disease and there is not an osteopathic school that is called a medical school.

This is not all there is in the law. It not only requires this diploma, but declares that any one presenting himself for a license shall also stand an examination in the "scientific branches of medicine." The suggestion is made in the briefs filed for the State that the studies mentioned by name in Sec. 9 of the act are the scientific branches of medicine, and the Board examines one in these branches alone. (It was admitted upon the hearing in the trial Court that the Medical Board of Texas does not examine the applicant in therapeutics or Materia Medica). The studies mentioned are anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. A man might pass a rigid examination in these studies and still be entirely unprepared or disqualified to practice medicine. He might not know anything about the administration of medicine or the treatment of disease. That expression, "the scientific branches of medicine," can not be gotten out of the statute. If "the scientific branches of medicine" do not include a knowledge of medicines (substantial remedial agents covered by what is called materia medica), and a knowledge of their proper use in the treatment of disease, then, according to the argument of opposing counsel, a man can obtain a license from the Board to practice medicine without any examination whatever as to his qualifications as a doctor of medicine.

We claim that in construing this law we are not called upon to believe that the purpose of the legislature was so manifestly wrong, but that by *medical school*, in Sec. 7 of the act, is meant a school known as a medical school

teaching the use of medicines in the treatment of disease and granting the degree of a doctor of medicine, and we think that an examination in "the scientific branches of medicine" would necessarily include an examination in those matters of medicines and therapeutics which lie at the very foundation of the practice of medicine.

The practice of osteopathy is one method of healing, and the practice of medicine is another method of healing, and one is no part of the other.

There is no distinct definite method that can be called the art of healing, and it is claimed that there are even now many well-established methods of healing some diseases, and if there are, as is said by the Supreme Court of Mississippi, the public is entitled to the benefit of them. Osteopaths would not ask that any method that relieves suffering should be suppressed for their benefit.

Is there no progress or no opportunity for progress in the field of healing?

Some person may discover in the future some method of healing far surpassing all present methods. Is such a discovery, or even an effort to find that which is better, to be shut out by our present "bona fide reputable medical schools"?

We agree that any one who holds himself out as a physician or doctor of medicine falsely and unlawfully ought to be punished, and that any one who should hold himself out as an osteopath falsely and unlawfully ought to be punished also.

But we maintain that the legislature has no right to force the title upon one, and declare that he is a doctor of medicine when he is not, and no right to compel a man to become a doctor of medicine before he can do any act of healing for pay, or follow any method of healing as a calling.

The convictions sustained in many of the cases cited in the briefs for the State were on account of the defendants falsely holding themselves out as doctors of medicine. We can all see the danger to society in such a wrong as that, and if this Texas statute is given the construction contended for by opposing counsel the legislature of Texas has tried to make the evil lawful, and declared that men may hold themselves out as doctors of medicine who know nothing about such a calling.

In the case of People vs. Aucult, cited by counsel for the State, from New York, it was shown that Aucult publicly professed to be a doctor of medicine. "Held himself out by sign and card as a doctor; made diagnosis, prescribed diet, conduct and remedies," and his conviction as a practitioner of medicine was sustained. The thing for which he was punished was falsely and unlawfully holding himself out as a doctor of medicine when he had no license. As counsel for the State refer so confidently to this New York case, we here suggest that Sec. 153 of Chap. 661 of the New York Medical Act referred to shows, as is stated in it, that by "medicine" the legislature meant "medicine and surgery"; that by "medical school" it meant "a medical school" in fact; and it declares that one licensed to practice medicine shall be examined in "therapeutics, including practice and materia medica." As the law now is in New York, an osteopath is given a license to practice osteopathy but not to practice medicine. The practice of medicine is by the very law confined to those who are really doctors of medicine, having diplomas, etc., as described in the law.

Counsel also refer confidently to the case of State vs. Gravette, 65 Ohio St., p. 289 (decided in Ohio after the Liffring case). Since the Liffring case, which we cite, was decided, and before the Gravette case arose, the legislature of Ohio declared in the statute that a doctor of medicine

should be examined for, and given a license to, practice medicine, and an osteopath examined for, and given a license to, practice osteopathy.

It is suggested that the great thing the legislature of Texas had in mind was diagnosis. But there is no definite system of diagnosis, the theories of different doctors being as diverse about diagnosis as they are about treatments. The theories and practice of doctors of medicine and osteopaths about diagnosis are as far apart as the poles. We may ask here what is to be done in the thousands and thousands of cases where no diagnosis is desired or is necessary? Are there not many thousands of people afflicted with rheumatism, neuralgia, bronchitis, catarrh, hay fever, colds, biliousness, dyspepsia, backache, headache, cuts, bruises, sores and boils, and many other common disorders that know it without any diagnosis? According to the argument made in support of this statute they cannot be treated for these afflictions, of which they know already too well, unless they receive the treatment from a graduate of medicine, because he is supposed to be able to tell them what they already know.

We again insist that this act of 1907, of which we complain, was passed for the benefit of a class, and not for the benefit of the people, and it is unreasonable, arbitrary, capricious and void.

Respectfully submitted,

MILLARD PATTERSON,
JO. F. WOODSON,
Attorneys for Ira W. Collins, Plaintiff in Error.

COLLINS *v.* THE STATE OF TEXAS.

ERROR TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS.

No. 165. Argued January 25, 26, 1912.—Decided February 19, 1912.

Where the party attacking the constitutionality of a statute has not suffered, the court will not speculate whether others may suffer.

Under its police power a State may constitutionally prescribe conditions to insure competence in those practising the healing art in its various branches, including those in which drugs are not administered—such as osteopathy. *Dent* v. *West Virginia*, 129 U. S. 114.

The Texas statute of 1907, establishing a Board of Medical Examiners, and conditions under which persons will be licensed to practise osteopathy, does not deprive one who refuses to apply for a license thereunder of his property without due process of law, or deny him the equal protection of the law.

In this case the writ of error to review a judgment denying plaintiff in error his release on *habeas corpus* is not dismissed but determined on the merits, as the single constitutional question goes to the jurisdiction of the state court, and has arisen as plainly as it ever will. *Bailey* v. *Alabama*, 211 U. S. 452, distinguished.

THE facts, which involve the constitutionality of certain provisions of the statute of Texas establishing the Board of Medical Examiners, are stated in the opinion.

Mr. Millard Patterson, with whom *Mr. Jo. F. Woodson*, was on the brief, for plaintiff in error:

The statute deprives plaintiff in error of his property without due process of law, and denies him the equal protection of the law.

The last two clauses of the Fourteenth Amendment are restrictions upon the exercise of arbitrary and capricious power over persons and property when exercised by the State through any of its agencies. *Ex parte Vir-*

ginia, 100 U. S. 339; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Holden* v. *Hardy*, 169 U. S. 366; *Barbier* v. *Connolly*, 113 U. S. 27; *Nelson* v. *The State Board of Health*, 57 S. W. Rep. 504; *State* v. *Mylod*, 40 Atl. Rep. (R. I.) 753; *State* v. *Biggs*, 46 S. E. Rep. 401 (N. Car.); *State* v. *Liffring*, 55 N. E. Rep. 168 (Ohio); *State* v. *McKnight*, 42 S. E. Rep. 580 (N. Car.); *Bennett* v. *Ware*, 61 S. E. Rep. 548; *State* v. *Biggs*, 46 S. E. Rep. 401.

The words "bona fide" and "reputable" in the description of the medical school of which one is to be a graduate mean, as stated in section seven of the act, that it shall be a school having a course of instruction as high as the better class of medical schools in the United States.

The acts, under the facts of this case, discriminate against plaintiff in error as an osteopath, and violate the Fourteenth Amendment, in that they discriminate in favor of nurses who practise not only nursing, but treat minor ailments; in favor of masseurs who, in their particular spheres of labor, treat diseases, light disorders and injuries, and charge therefor money and other compensation; and also discriminate in favor of druggists, who prescribe remedies and charge therefor.

If Chapter 123 applies to an osteopath who practises only as such, it discriminates against osteopaths in providing for the issuance of a verification license to legal practitioners of medicine who were practising under the provisions of previous laws, or under diplomas of reputable and legal colleges of medicine, there being no provision in the law for the issuing of a verification license to osteopaths.

The acts are in violation of the Fourteenth Amendment in discriminating against osteopaths in requiring that they should have a diploma from a bona fide medical school before they can present themselves for examination before the Medical Board of Examiners for a license to prac-

tise, and in requiring them to accept a license to practise medicine.

To require plaintiff to obtain a diploma from a medical college as defined in said act, and to require him to pass an examination in the scientific branches of medicine before he could be granted a license to practise osteopathy is a direct discrimination in favor of those medical schools requiring a knowledge of materia medica, therapeutics, chemistry and the practice of medicine, in contravention of the Fourteenth Amendment. *Watson* v. *Maryland*, 218 U. S. 173; *Reetz* v. *Michigan*, 188 U. S. 505, distinguished.

Mr. Jewell P. Lightfoot, Attorney General of Texas, with whom *Mr. James D. Walthall*, *Mr. C. E. Lane*, *Mr. James N. Wilkerson*, *Mr. Timothy J. Scofield* and *Mr. Frank J. Loesch* were on the brief, for defendant in error:

The acts do not violate the privileges or immunities clause; that provision applies only to those privileges and immunities which are incident to citizenship of the United States as distinguished from citizenship of the several States. *Slaughter House Cases*, 16 Wall. 36, 74; *Bartmeyer* v. *Iowa*, 18 Wall. 129; *Miller* v. *Texas*, 153 U. S. 535; *Orr* v. *Gilman*, 183 U. S. 278; *Re Kemmler*, 136 U. S. 436; *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Reese*, 92 U. S. 214; *Hall* v. *DeCuir*, 95 U. S. 485; *Kirtland* v. *Hotchkiss*, 100 U. S. 491; *Presser* v. *Illinois*, 116 U. S. 252.

The right to practise medicine without regulation is not one of such privileges and immunities. *Supra* and *Dent* v. *West Virginia*, 129 U. S. 114.

The acts under consideration do not violate the due process clause. They were passed under the police power of the State, and are a proper exercise of that power in scope and purpose. The details of such legislation rest primarily within the discretion of the state legislature. This court can only interfere when fundamental rights guaranteed un-

der the Federal Constitution are violated by such statutes. *Watson* v. *Maryland*, 218 U. S. 173; *Dent* v. *West Virginia*, 129 U. S. 114; *Reetz* v. *Michigan*, 188 U. S. 505; *Hawker* v. *New York*, 170 U. S. 189; *Meffert* v. *Packer*, 195 U. S. 625; *Williams* v. *Arkansas*, 217 U. S. 79; *People* v. *Apfelbaum*, 251 Illinois, 18; *State* v. *Smith*, 135 S. W. Rep. 465; *Parks* v. *State*, 159 Indiana, 211; *Feller* v. *State Examiners*, 34 Minnesota, 391; *Burroughs* v. *Webster*, 150 Indiana, 607; *Bragg* v. *State*, 134 Alabama, 165; *State* v. *Buswell*, 40 Nebraska, 158; *Little* v. *State*, 60 Nebraska, 749; *State* v. *Gravett*, 65 Oh. St. 289; *State* v. *Marble*, 72 Oh. St. 21; *People* v. *Allcutt*, 102 N. Y. Supp. 678, aff'd 189 N. Y. 517; *People* v. *Mulford*, 125 N. Y. Supp. 680, aff'd 202 N. Y. 624; *People* v. *Reetz*, 127 Michigan, 87; *People* v. *Phippin*, 70 Michigan, 6; *State* v. *Miller*, 146 Iowa, 521; *State* v. *Adkins*, 145 Iowa, 671; *State* v. *Wilhite*, 132 Iowa, 226; *State* v. *Edmunds*, 127 Iowa, 333; *State* v. *Heath*, 125 Iowa, 585; *State* v. *Bair*, 112 Iowa, 466; *Foster* v. *Police Commissioners*, 102 California, 483; *Scholle* v. *State*, 90 Maryland, 729; *State* v. *Yegge*, 19 S. Dak. 234.

The provisions of this statute are not such as result in any arbitrary deprivation of plaintiff in error's liberty or property, or of his right to engage in a lawful calling. Cases *supra* and *Commonwealth* v. *Porn*, 196 Massachusetts, 326; *Bandel* v. *Dept. of Health*, 193 N. Y. 133; McGehee on Due Process of Law, 52.

The act is not void as exceeding the police power of the State on account of any menace to the public, such as the danger of being exposed to the administration of drugs by persons not skilled in their administration.

This court is not concerned with the wisdom or policy of the act, so long as the act fairly secures or tends to secure the objects sought to be attained by it and is not patently unreasonable. *Otis* v. *Parker*, 187 U. S. 606.

The act does not violate the equal protection clause.

The state legislature has the power to make regulations

of the character involved herein, and the details of such legislation rest primarily within the discretion of the state legislature. Cases *supra*.

The classification made in the statute is not arbitrary, unreasonable or oppressive, and was within the legislative power of the State, as having a fair relation to the objects of the statute. Within the sphere of its operation it affects alike all persons similarly situated.

Plaintiff in error does not, and cannot on the record in this case, contend that the Board of Medical Examiners of Texas has been guilty of any unfair or unjust action toward him. His contentions are based upon fancied inequalities of the statute which arise only on his own theory of how the act would have been construed by the board had he in fact requested from it authority to practise; or the right to take an examination as provided by the act.

While the construction of the act by the Court of Criminal Appeals of the State of Texas may not, perhaps, be in all respects conclusive upon this court, that construction is one toward which this court will lean. Cases *supra*, and see *Atchison &c. Railroad Co.* v. *Matthews*, 174 U. S. 96, 101; *Marchant* v. *Penna. R. R. Co.*, 153 U. S. 380; *Baltimore Traction Co.* v. *Belt R. Co.*, 151 U. S. 137; *Minneapolis &c. R. Co.* v. *Minnesota*, 193 U. S. 53; McGehee on Due Process, 37, 40, 306, note 7.

The act will be taken in this court as construed by the Court of Criminal Appeals of the State of Texas to include in the "practise of medicine" the practise of osteopathy. 57 Tex. Crim. 2.

The act must also be taken as not in conflict with the constitution of Texas. *Reetz* v. *Michigan*, 188 U. S. 505.

The object of the statute is to protect the sick and afflicted from the pretensions of the ignorant, the unskilled and the unscrupulous. The statute was passed to protect the health and promote the welfare of the people of Texas,

and to protect them from imposition and fraud. It seeks to prohibit and punish fraud, deception, charlatanry and quackery in the practice of healing, to prevent empiricism, and to bring the practice under such control that, as far as possible, the ignorant, the unscientific, the unskilled, and the unscrupulous practitioner may be excluded. Cases *supra; State* v. *Oredson*, 96 Minnesota, 509; *O'Neil* v. *State*, 115 Tennessee, 427; *People* v. *Blue Mountain Joe*, 129 Illinois, 370; *State* v. *Bair*, 112 Iowa, 466; *Commonwealth* v. *Jewelle*, 199 Massachusetts, 558; *People* v. *Phippin*, 70 Michigan, 6, 19.

In construing the act consideration must be given to the purpose of the legislature, and to the mischief intended to be guarded against. Whether it is fair and reasonable and a valid exercise of the police power, or arbitrary and capricious must be determined in the light of the object sought to be attained by the act. 1 Kent's Comm. 462; 2 Sutherland's Stat. Const. (2d ed. by Lewis), §§ 370–376, 456.

There is no vested right to practise either the medical or legal profession, free from supervision and regulation by the State. *Broadwell* v. *Illinois*, 16 Wall. 130; *Reetz* v. *Michigan*, 188 U. S. 505; *Hawker* v. *New York*, 170 U. S. 189; *People* v. *King*, 110 N. Y. 418; *People* v. *Phippin*, 70 Michigan, 6; 22 Am. & Eng. Ency. of Law (2d ed.), 9, 780.

The statute does not infringe the provisions of the *ex post facto* clause; see cases *supra; Eastman* v. *State*, 109 Indiana, 281; *State* v. *Creditor*, 44 Kansas, 568; *Craig* v. *Medical Examiners*, 12 Montana, 211; *State* v. *Coleman*, 64 Oh. St. 377.

This statute is not an unconstitutional interference with vested rights. *Allopathic State Board* v. *Fowler*, 50 La. Ann. 1358; *People* v. *Moorman*, 86 Michigan, 433; *Williams* v. *People*, 121 Illinois, 87; *Thompson* v. *Staats*, 15 Wend. (N. Y.) 395; *Hewitt* v. *Charier*, 16 Pick. (Mass.)

395; *State* v. *Hale*, 15 Missouri, 606; *Bibber* v. *Simpson*, 50 Maine, 181; *Dankworth* v. *State*, 136 S. W. Rep. 788.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a writ of error to the Texas Court of Criminal Appeals upon a judgment denying the plaintiff in error a release by habeas corpus. The plaintiff in error is held upon an information charging him with practising medicine for money by treating a named patient for hay fever by osteopathy, without having registered his authority as required by a Texas statute of April 17, 1907, c. 123 (Gen. Laws, 1907, p. 224). He denies the constitutionality of the act.

The statute establishes a Board of Medical Examiners and requires "all legal practitioners of medicine in this State, who, practising under the provisions of previous laws, or under diplomas of a reputable and legal college of medicine, have not already received license from a State Medical Examining Board of this State" to prove their diplomas, or existing license, or exemption existing under any law; whereupon they are to receive a verification license. § 6. By § 7 applicants not licensed under § 6 must pass an examination, conditioned among other things on their being graduates of "bona fide reputable medical schools;" schools to be considered reputable "whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each." By § 9 the examinations are to be fair to every school of medicine, are to be conducted on the scientific branches of medicine only, and are to include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and

medical jurisprudence. Those who pass are to be granted licenses to practise medicine. By § 10 nothing in the act is to be construed to discriminate against any particular system, and the act is not to apply to dentists legally registered and confining themselves to dentistry, nurses who practise only nursing, masseurs, or surgeons of the United States Army, Navy, &c., in the performance of their duties.

The only other material sections of the act are §§ 13 and 14, the former of which declares that "any person shall be regarded as practising medicine within the meaning of this act. . . . (2) Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation." By § 14 any person practising medicine in violation of the act is punished by fine and imprisonment, and is not to recover anything for the services rendered.

The facts charged against the plaintiff in error are admitted. It also is admitted that before the passage of the statute he had spent $5,000 in fitting up his place, and was deriving a net income from his calling of at least the same sum. He held a diploma from the chartered American School of Osteopathy, Kirksville, Missouri, after a full two years' course of study there, but it does not appear that he presented this diploma to the Board of Medical Examiners or attempted to secure either a verification license or license in any form. The Board in passing upon qualifications does not examine in therapeutics or materia medica, which, it will be observed, are not mentioned in the act. On these facts we are of opinion that the plaintiff in error fails to show that the statute inflicts any wrong upon him contrary to the Fourteenth Amendment of the Constitution of the United States. If he has not suffered we are not called upon to speculate upon other cases, or

to decide whether the followers of Christian Science or other people might in some event have cause to complain.

We are far from agreeing with the plaintiff in error that the definition of practising medicine in § 13 is arbitrary or irrational, but it would be immaterial if it were, as its only object is to explain who fall within the purview of the act. That it does, and of course we follow the Texas court in its decision that the plaintiff in error is included. It is true that he does not administer drugs, but he practises what at least purports to be the healing art. The State constitutionally may prescribe conditions to such practice considered by it to be necessary or useful to secure competence in those who follow it. We should presume, until the Texas courts say otherwise, that the reference in § 4 to the diploma of a reputable and legal college of medicine, and the confining in § 7 of examinations to graduates of reputable medical schools, use the words medicine and medical with the same broad sense as § 13, and that the diploma of the plaintiff in error would not be rejected merely because it came from a school of osteopathy. In short, the statute says that if you want to do what it calls practising medicine you must have gone to a reputable school in that kind of practice. Whatever may be the osteopathic dislike of medicines, neither the school nor the plaintiff in error suffers a constitutional wrong if his place of tuition is called a medical school by the act for the purpose of showing that it satisfies the statutory requirements. He cannot say that it would not have been regarded as doing so, because he has not tried. *Dent* v. *West Virginia*, 129 U. S. 114, 124.

An osteopath professes, the plaintiff in error professes, as we understand it, to help certain ailments by scientific manipulation affecting the nerve centres. It is intelligible therefore that the State should require of him a scientific training. *Dent* v. *West Virginia*, 129 U. S. 114; *Watson* v. *Maryland*, 218 U. S. 173. He like others

must begin by a diagnosis. It is no answer to say that in many instances the diagnosis is easy—that a man knows it when he has a cold or a toothache. For a general practice science is needed. An osteopath undertakes to be something more than a nurse or a masseur, and the difference rests precisely in a claim to greater science, which the State requires him to prove. The same considerations that justify including him justify excluding the lower grades from the law. *Watson* v. *Maryland*, 218 U. S. 173, 179, 180. Again, it is not an answer to say that the plaintiff in error is prosecuted for a single case. If the legislature may prohibit a general practice for money except on the condition stated, it may attach the same conditions to a single transaction of a kind not likely to occur otherwise than as an instance of a general practice. A distinction between gratuitous and paid for services was made in the Maryland statute sustained in *Watson* v. *Maryland*, 218 U. S. 173, 178. Finally, the law is not made invalid as against the plaintiff in error by the fact that he had an established business when the law was passed. *Dent* v. *West Virginia*, 129 U. S. 114. *Reetz* v. *Michigan*, 188 U. S. 505, 510.

The objections that prevailed against a writ of error like this in *Bailey* v. *Alabama*, 211 U. S. 452, do not exist here. There as here it was attempted to interrupt the ordinary course of a trial by habeas corpus, and there as here the State allowed the attempt and discharged the writ on the merits. But in that case it did not appear that the constitutional question relied upon had arisen or necessarily would arise, although afterwards it did. 219 U. S. 219. But here the facts are admitted, the question appears as plainly as it ever will, and is supposed to go to the jurisdiction of the court. Therefore we have discussed the case on the merits; perhaps more than it needed in view of the decisions cited and others that establish the right of the State to adopt a policy even upon

medical matters concerning which there is difference of opinion and dispute. *Hawker* v. *New York*, 170 U. S. 189; *Meffert* v. *Packer*, 195 U. S. 625; *Jacobson* v. *Massachusetts*, 197 U. S. 11. See also *Williams* v. *Arkansas*, 217 U. S. 79.

Judgment affirmed.

MEYER, AUDITOR OF THE STATE OF OKLA-